TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 170

FINANCE AND GUARANTY COMPANY, PETITIONER,

vs.

HENRY W. OPPENHEIMER, TRUSTEE IN BANKRUPTCY FOR W. A. LEE, TRADING AS NATIONAL MOTOR COMPANY, BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 31, 1928

CERTIORARI GRANTED MARCH 7, 1928

(32,425)

(32,425)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 858

FINANCE AND GUARANTY COMPANY, PETITIONER,

vs.

HENRY W. OPPENHIMER, TRUSTEE IN BANKRUPTCY FOR W. A. LEE, TRADING AS NATIONAL MOTOR COMPANY, BANKRUPT

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IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA

[Caption omitted]

At Law. No. 611

HENRY W. OPPENHEIMER, Trustee in Bankruptcy for W. A. Lee, Trading as National Motor Company, Bankrupt, Plaintiff,

vs.

FINANCE AND GUARANTY COMPANY, Defendant

BILL OF COMPLAINT—Filed December 15, 1922

To the Honorable Judge of [illegible] said Court:

Your complainant, Henry W. Oppenheimer, Trustee in Bankruptcy of W. A. Lee, trading as National Motor Com-
[fol. 2] pany, Bankrupt, respectfully shows unto the court the following case:

1. That on the 20th day of January, 1922, certain creditors filed a petition in this honorable court asking that W. A. Lee, trading at National Motor Company, be declared a bankrupt in accordance with the Acts of Congress in such cases made and provided, and that thereupon such proceedings were had that the said W. A. Lee, trading at National Motor Company, was, on the 25th day of February, 1922, duly adjudged a bankrupt, and your complainant thereafter was duly elected and qualified and gave bond as Trustee in Bankruptcy for said bankrupt, all of which appears more fully and at large from the official records of this honorable court;

2. That the said bankrupt was, for a period of time immediately preceding his bankruptcy, in the retail automobile business with his place of business and sales and show rooms at 1629 West Broad Street, in the City of Richmond, Virginia, and that at said place of business he kept in stock and offered for sale to the public certain automobiles,

among others four Velie Touring cars Nos. 114857, 116036, 115569, and 78197, which were part of the bankrupt's stock of merchandise and were on display and offered to the public for sale, and that the Finance and Guaranty Company, a body corporate or its agents, knew or should have known that said W. A. Lee, trading as National Motor Company, was fairly exposing and offering for sale to the general public the automobiles placed in his show room or sales room and more particularly the four Velie automobiles above mentioned.

3. On the 10th day of January, 1922, a time within the four months immediately preceding the adjudication in bankruptcy of said W. A. Lee, trading at National Motor Company, the Finance and Guaranty Company, a corporation chartered by and existing under the laws of the State of Delaware, a creditor of said bankrupt, filed in the Law and Equity Court of the City of Richmond, Virginia, a memorandum of an action of detinue, returnable to rules the third Monday in January, 1922, against the said W. A. Lee, [fol. 3] trading as National Motor Company, said action for detinue being for the recovery of the said four Velie automobiles, but so far as your complainant is informed and believes process in the said action has never been served on the defendant therein and the cause is still at rules, and on the same day, to wit, January 10, 1922, one W. O. Holmes, agent of said Finance and Guaranty Company, made oath before Luther Libby, Clerk of said Law and Equity Court, that there was good reason to believe the said defendant in said action of detinue insolvent so that any recovery against him for the alternate value of the property and for damages and costs would probably prove unavailing; that in accordance with the Statutes of Virginia in such cases made and provided the said Clerk of the said Court thereupon issued a process of seizure directing the Sheriff of the City of Richmond to take possession of the said automobiles and to deliver them to the said plaintiff in the said action; that thereupon the Sheriff of the City of Richmond, in accordance with said process, took possession of said four Velie automobiles and delivered them to the said W. O. Holmes, as agent for said Finance and Guaranty Company. Certified copies of which said proceedings in said action of

detinue are herewith filed marked "Exhibit A," and asked to be read as a part of this bill of complaint. Your complainant avers and charges that the said Finance and Guaranty Company still has the said four automobiles or else has disposed of them, and your complainant avers that he has made demand upon said Finance and Guaranty Company that it deliver to him the said four automobiles, which has been and still is refused.

4. Your complainant does not know whether said Finance and Guaranty Company had any deed of trust, chattel mortgage, reservation of title, or other supposed lien on said four Velie automobiles. He has made diligent search and has been unable to find that any such lien was recorded in the Clerk's Office of the Chancery Court of Richmond, Virginia, such being the office in which such instruments are required by law to be recorded in the City of Richmond, and your complainant charges that no such supposed lien was recorded. Your complainant is advised, however, and so charges that he is entitled to recover the said four Velie automobiles or their alternate value regardless of whether [fol. 4] there was any such lien and regardless of whether it was recorded, if any such there was.

5. Your complainant charges that at the time when the said Finance and Guaranty Company so took possession of the said four Velie automobiles, the said bankrupt was insolvent and so continued up to the time of his adjudication.

6. Your complainant charges that the effect of allowing the said Finance and Guaranty Company to retain the said four Velie automobiles will be to enable it to obtain a greater percentage of its debt than other creditors of the same class.

7. Your complainant further specifically charges that the said Finance and Guaranty Company, a person corporate, or its agents acting therefor, had at the time it so took possession of said four Velie automobiles, reasonable cause to believe that the said W. A. Lee, trading as National Motor Company, was insolvent and that a preference would thereby be effected, and your complainant further charges that the said taking possession of said automobiles is a voidable

preference in bankruptcy as defined and set forth in the Bankruptcy Act of 1898 as adopted by Congress, and the amendments thereto, and that your complainant is entitled to recover the said four automobiles or their alternate value.

In consideration whereof and forasmuch as your complainant is without remedy save in a court of equity where alone matters of this kind are properly cognizable, your complainant prays that the Finance and Guaranty Company, a corporation, be made a party defendant hereto and required to answer the same, but not under oath, answer under oath being hereby expressly waived; that the said taking possession of the said four Velie automobiles by said defendant may be adjudged a voidable preference in bankruptcy, and that the said Finance and Guaranty Company be required to turn over to your Trustee the said four Velie automobiles or to account to him for the money value thereof; that all proper orders and decrees issue and accounts be taken, and that your complainant may have such other, further and more general relief as the nature [fol. 5] of his case may require or to equity shall seem meet.

And your complainant will ever pray, etc.

(Signed) Henry W. Oppenhimer, Trustee in Bankruptcy for W. A. Lee, Trading as National Motor Company, Bankrupt. Jos. M. Hurt, Jr., Counsel.

Duly sworn to by Henry W. Oppenhimer. Jurat omitted in printing.

[fol. 6] "Exhibit A" to Bill of Complaint

Virginia:

In the Law and Equity Court of the City of Richmond

Finance and Guaranty Company, a Corporation Chartered and Existing under the Laws of the State of Delaware,

vs.

W. A. Lee, Trading as National Motor Company

The clerk will please issue process against the above named defendant to answer an action in detinue for four

(4) Velie Touring Cars, numbered as follows: 114857, of value of $1,000., 116036, of value of $1,000.00, 115569 of value of $1,000., and 78197, of value of $1,000., all of the aggregate value of $4,000.00.

Damages $4,000.00. Returnable to Rules the third Monday in January, 1922.

Chas. W. Crowder, p. q.

A copy teste: (Signed) Luther Libby, Clerk.

VIRGINIA:

In the Clerk's Office of the Law and Equity Court of the City of Richmond, January 19th, 1922

FINANCE AND GUARANTY COMPANY, a Corporation Chartered and Existing under the Laws of the State of Delaware, Plaintiff,

against

W. A. Lee, Trading as National Motor Company, Defendant

[fol. 7] This day personally appeared before me, Luther Libby, Clerk of the Law and Equity Court of the City of Richmond, in my office W. O. Holmes, who being duly sworn, made oath that there is good reason to believe that the defendant is insolvent, so that any recovery against him for the alternate value of the property and for damages and costs will probably prove unavailing, and that such property will be destroyed or materially damaged or injured by neglect, abuse or otherwise if permitted to remain longer in possession of the defendant or other person claiming under him that said property, to wit: four (4) Velie Touring Cars, numbered as follows: 114,857 of value of $1,000; 116,036 of value of $1,000.00; 115,569 of value of $1,000 and 78197 of value of $1,000, all of the aggregate value of $4,000.00 and that the said plaintiff is entitled to recover the same.

Given under my hand this 19th day of January, 1922.

Luther Libby, Clerk

A copy—Teste: (Sgd.) Luther Libby, Clerk.

Commonwealth of Virginia to the Sheriff of the City of Richmond, Greeting:

We command you to summon W. A. Lee, trading as National Motor Company, to appear at the Clerk's Office of our Law and Equity Court of the City of Richmond, at the Courthouse of the said City, at the Rules to be holden for said Court on the Third Monday in January, 1922, to answer the action of Finance and Guaranty Company, a corporation chartered and existing under the laws of the State of Delaware, of a plea of detinue for Four (4) Velie Touring Cars numbered as follows: 114,857, of value of [fol. 8] $1,000; 116,036, of value of $1,000; 115,569 of value of $1,000, and 78,197, of value of $1,000, all of the aggregate value of $4,000.00.

Damages, Four Thousand Dollars.

And have then there this writ.

Witness Luther Libby, Clerk of our said Court, at Richmond, this 10th day of January, 1922, and in the 146th year of the Commonwealth.

A Copy. Teste:

Luther Libby, Clerk.

Not found, whereabouts unknown to me.

J. Herbert Mercer, Sheriff of the City of Richmond, Va.

A Copy Teste: (Sgd.) Luther Libby, Clerk.

The Commonwealth of Virginia to the Sheriff of the City of Richmond, Greeting:

Whereas since the institution of an action of detinue in our Law and Equity Court of the City of Richmond, brought by Finance and Guaranty Company, a corporation, against W. A. Lee, trading as National Motor Company, to recover Four (4) Velie Touring Cars numbered as follows: 114,857, of value of $1,000.00, 116,036, of value of $1,000; 115,569, of value of $1,000.00 and 78,197 of value of $1,000, all of the aggregate value of $4,000.00 there has been filed in the Clerk's Office of our said Court an affidavit that the action is to recover the property above described of the said aggregate value as aforesaid, and that the affiant verily believes that the plaintiff is entitled to recover the same.

[fol. 9] Therefore we command you that you seize and take into possession the said property above mentioned and described in said affidavit, and deliver the same to the plaintiff. And that you make return hereof at the Rules to be held in the Clerk's Office of said Court on the Third Monday in January, 1922.

And have then there this writ.

Witness Luther Libby, Clerk of our said Court at Richmond, Va., this 10th day of January, 1922. And in the 146th year of the Commonwealth.

Luther Libby, Clerk.

A copy. Teste: (Sgd.) Luther Libby, Clerk.

Received of J. Herbert Mercer, Sheriff of City of Richmond, Va., the within described automobiles, to wit: One Velie Automobile 114,857—One Velie 116,936—One Velie 115,569—One Velie 78197—total of Four Velie Automobiles, Richmond, Va., Jany. 10, 1921.

The said cars taken under within process and delivered to plaintiff as herein directed.

Finance & Guaranty Co., per W. O. Holmes, Special Representative.

Executed in the — of Richmond, Va., Jany. 10, 1922, by seizing and taking in possession each of within described automobiles and delivering each of said automobiles to said Plaintiff as shown by receipt above endorsed.

J. Herbert Mercer, Sheriff of the City of Richmond, Va., by J. C. Crump, Deputy Sheriff.

$6.00.

A copy—teste: Luther Libby, Clerk.

[fol. 10] In United States District Court

Motion to Dismiss—Filed January 4th, 1923

And now comes the defendant and moves that the bill be dismissed for the following reasons:

1

That it appears from the prayer of the bill of complaint that the relief sought is the recovery of four certain auto-

mobiles, or the money value thereof, because, it is alleged by the said bill of complaint, that said automobiles were delivered by the alleged bankrupt to the defendant under such circumstances as constituted a voidable preference under the bankruptcy act.

2

That there are no facts alleged in said bill which justify equity jurisdiction, because the complainant has a full, complete and adequate remedy at law, in that if the said plaintiff be entitled to recover at all, full recovery could be had and full relief obtained by an action of detinue on the law side of the Court.

Wherefore, the defendant moves that the bill of complaint be dismissed, agreeable to Equity Rule 29, of the Supreme Court of the United States.

Finance & Guaranty Company, by (Sgd.) S. M. Brandt, Counsel. (Sgd.) S. M. Brandt, Solicitor for Finance & Guaranty Company.

In United States District Court

Motion to Transfer Cause to Law Side of Court—Filed January 4th, 1923

And now comes the defendant and moves that this cause [fol. 11] be transferred to the Law side of this Court, and there proceeded with, for the reasons following:

That it appears from the prayer of the bill of complaint that the relief sought is recovery of the property alleged to have been delivered to this defendant, or the money value thereof, and that if the plaintiff is entitled to recover he has a full, complete and adequate remedy at law by action of detinue, and that the said bill for this reason is without equity.

Wherefore, the defendant moves that this cause be ordered transferred to the law side of this Court and the plaintiff be ordered to amend his bill accordingly, and that such other orders as to costs or otherwise may be made

as to the Court may seem proper, in accordance with Equity Rule No. 22, as promulgated by the Supreme Court of the United States.

Finance & Guaranty Company, by (Sgd.) S. M. Brandt, Counsel. (Sgd.) S. M. Brandt, Solicitor for Finance & Guaranty Company.

In United States District Court

[Title omitted]

Order Transferring Cause to Law Side of Court—Filed May 25, 1923

This cause came on to be heard on motion of the defendant to transfer it to the law side of the court and was ar-[fol. 12] gued by counsel. Upon consideration thereof, it appearing that the suit should have been brought as an action on the law side of the court,

It is ordered, adjudged and decreed that it be transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential to the determination of the issues presented.

D. Lawrence Groner, United States District Judge.

May 25th, 1923.

In United States District Court

[Title omitted]

Order Directing Defendant to File Grounds of Defense—Filed October 2, 1923

It is ordered that the Defendant herein do, within five (5) days from the entry of this order, file its grounds of defense herein.

(Sgd.) Groner, Judge.

Oct. 2, 1923.

[fol. 13] IN UNITED STATES DISTRICT COURT

LETTER TO COUNSEL CONTAINING CONCLUSIONS OF THE COURT —Filed November 15, 1923

November 13th, 1923.

Mr. Joseph M. Hurt, Jr., 1111 East Main Street, Richmond, Va., and S. M. Brandt, Seaboard Bank Building, Norfolk, Va.

DEAR SIRS: I have carefully considered the evidence and the arguments of counsel in this case. Lack of time prevents anything more than a brief expression of my views.

It sufficiently appears from the evidence that the bankrupt executed a conditional sale agreement for the automobiles in question; that by this agreement title to the cars was reserved to the Finance Guaranty Company, and that the agreement was duly admitted to record in accordance with the existing Virginia statute on that subject. It has been frequently held that such an agreement is valid, and that the reservation of title is good as against a trustee in bankruptcy. Prior to the Bankruptcy Act of June 25th, 1910, by which the Trustee was given the status of a lien creditor or a judgment creditor, dependent upon whether the property came into the possession of the bankruptcy court or not, it was held that the holder of a conditional sale contract, even when unrecorded, had a better title to the property than the trustee; York Mfg. Co. vs. Cassell, 201 U. S. 344; Holt vs. Henley, Trustee, 232 U. S. 637. In the last named case, which arose just after the amendment of 1910, but in which the lien was taken prior to the effective date of the amendment, the Supreme Court held:

"His continuing title simply was postponed to purchasers without notice and creditors getting a lien."

[fol. 14] After the passage of the amendment referred to, the rights of the trustee were held to be superior to those of the holder of an unrecorded reserved title lien or conditional sale contract, wherever the property involved came into possession, by virtue of the bankruptcy, of the bankrupt court; and in Big Four Implement Company vs. Wright (C. C. A., 8th Circuit) 207 Fed. 535, it was held that the lien conferred on the trustee by the amendment of 1910

dated as of the time of the commencement of the bankruptcy proceeding. In Rock Island Plow Company vs. Reardon, Trustee, 222 U. S. 354, the holder of an unrecorded lien had taken possession of the property covered by it before the bankruptcy. It was conceded in that case that such action would have been good against the trustee in bankruptcy but for the fact that prior to the taking possession another creditor had secured a lien by execution, which lien was preserved by the trustee for the benefit of the creditors. Passing on another case in which the facts were nearly identical with this, Industrial Corporation vs. Cappleman, Trustee, (decided Oct. 21st, 1922) the Circuit Court of Appeals for this Circuit said:

"When a state recording statute, as construed by the state court, only provides for protection against unrecorded instruments of 'lien creditors' . . . . etc., it has been held that the trustee cannot recover the property when the holder of an unrecorded mortgage or other instrument requiring record acquires possession before the filing of the petition in bankruptcy."

It would seem, therefore, perfectly clear that, unless the so-called "Traders' Act" makes a contract of the kind in question void ab initio, and therefore invalid even as between the parties, the rule above announced would apply, and the title of the Finance & Guaranty Company held to be superior to that of the trustee. I do not think that any authority can be produced to sustain the position that such a contract is void abinitio. An automobile is, in itself, sufficiently distinctive and susceptible of identification to be made the subject of a reserved title contract or even of a mortgage. It is true it has been held by the Court of Appeals of Virginia, in Boice vs. Finance, etc., Corporation, 127 Va. 563, that such a contract is void as against the pur-[fol. 15] chaser of an automobile kept by a retail dealer for sale, and exhibited for sale in his store or salesroom. This decision, however, was predicated not upon the Traders' Act, but upon the so called "shifting stock of goods doctrine," which has obtained in Virginia for more than fifty years. There is nothing in the opinion in this case to suggest that such a contract is not good as between the parties, or that it is not good as against the world, except where the holder of the lien allows the property to be exhibited for

sale in a public salesroom. The Traders' Act, Sec. 5224 of the Code of Virginia 1919, has been construed by the Court of Appeals of Virginia in several cases, notably Hoge, etc., vs. Turner, 96 Va. 624; Edmunds, etc., Trustees, vs. Hobbie, 97 Va. 588, and Partlow vs. Lickliter, 100 Va. 631. In the last named case the Court, in speaking of the Section, says:

"It is found in an independent chapter which deals with a restricted class—partners, partnership associations, factors, agents, and traders—and was passed in the interest of trade and commerce. It operates chiefly upon shifting stocks of goods, wares, and merchandise, bought for the express purpose of daily indiscriminate sale, and constantly changing hands, property difficult of accurate description, and impossible of continued identification, through the medium of the registry laws. To undertake to apply those laws to that class of citizens, and to that species of property, if their enforcement were practicable, would operate as an embargo on trade."

While it may be admitted that the bankrupt in this case would probably come under the description "trader," it is certainly true that an automobile is neither "difficult of accurate description," nor "impossible of continued identification;" but beyond all of this, it seems to me perfectly clear that the statute was designed to prevent a person engaged in trade from operating under a fictitious name, and in such case to make the property of his principal liable for his debts. The statute itself, after describing the different classes of traders, says that if such person "fail to disclose the name of his principal or partner by a sign," * * * etc., "all the property," * * * etc., [fol. 16] "used in such business shall, as to the creditors of any such person, be liable for the debts of such person." In this case the Finance & Guaranty Company did not occupy the relation of principal to the bankrupt. Its true relation was that of vendor. It acquired title to the property from the manufacturer, by the payment of the draft sent with the bill of lading for the cars, and delivered the same to the bankrupt, reserving title until the payment of the debt. In the Lickliter case the precise relation of Partlow, the bill of sale creditor, to Lickliter does not ap-

pear, but I think it does sufficiently appear that Partlow was a partner, or a principal, in the business, because it is there shown that prior to the occurrences out of which the issue in that case arose she had obtained an injunction restraining Lickliter from collecting the accounts of the business or from interfering with the property or the business in question. Nor do I think, irrespective of the above, that the case is conclusive of the facts shown to exist in the case at bar, namely, the repossession of the property before the right of any creditor armed with judical process existed. The word "creditors" used in the statute did not include simple creditors, but only creditors by judgment or lien. There were none such at the time of the repossession of the property in this case, and the trustee's right, under the amendment of 1910 to the bankruptcy law, as a judgment creditor became effective only as of the date of the commencement of the proceeding in bankruptcy, some ten days or two weeks after the property was removed from the bankrupt's premises. There is nothing, in my opinion, in the case of Chesapeake Shoe Company vs. Seldner, 122 Fed. 593, or in that of Virginia Book Company vs. Sites, 254 Fed. 46, to the contrary.

In the Chesapeake Shoe Company case, supra, Small, the bankrupt, was a shoe dealer, to whom the Chesapeake Company had sent a consignment of shoes, which were contained in his stock, and which, as their agent, he was authorized to sell and remit to them, after the deduction of his commissions. They were found by the trustee when he took possession.

In the Sites case, the conditions were the same, except that a day or two before the bankruptcy the book company removed its books.

In both cases the relation of principal and agent existed, and in neither case was the property itself, per se, subject [fol. 17] to recordation by proper description, etc., as required by the recordation statute.

It appears, however, from the evidence that at the time the property was taken, under judical process issuing out of the state court, one or more of the cars had been equipped with extras costing several hundred dollars. These extras were not covered by the reserved title contract and should not have been taken, and the Finance & Guaranty Company

is, of course, liable for their value as shown by the evidence. It also appears, from the return of the officer making the levy, that two of the cars which were removed were of different numbers from those described in the reserved title contract. The evidence tended to show that this was an error on the part of counsel who prepared the seizure papers and made the return of the officer. The officer himself, however, testifies that the numbers on the cars corresponded with the numbers in the writ. It goes without saying that if the property taken did not fit the description of the property the title to which was reserved, the seizure was unlawful. It is equally true that if the seizure papers and the writ were inadvertently made out incorrectly, this should not militate against the interest of the title holder. To the end that this question may be decided, and particularly in view of the statement of counsel that the cars are still in the possession of the Finance & Guaranty Company, I suggest that the trustee in bankruptcy appoint a representative to inspect the cars and compare them with the original reserved title contract, and if it appears that they are the same, no further point will be made of this matter. However, if it appears otherwise, or if the Finance & Guaranty Company is unable to prove the identity of the cars with the description of the property reserved in the agreement, a decree will be entered against them for the value of the two cars in question.

Yours very truly, (Signed) D. Lawrence Groner, by G. T. D. D. Lawrence Groner, United States District Judge.

Copy to clerk, with papers.

[fol. 18] In United States District Court

[Title omitted]

Judgment and Order Settling Bill of Exceptions—Filed October 16, 1924

This day came the parties in the above action, by their attorneys, and by agreement of parties, trial by jury was

waived, and all matters of law and fact are submitted to the Court, and the Court having fully heard the evidence, doth consider that the plaintiff recover of the defendant the sum of $700.00 and one half of his costs herein, and no more, to which action of the Court the plaintiff, by Counsel, duly excepted, and thereupon tendered his certificate and bill of exceptions, which being examined and found correct, is signed, sealed, and made a part of the record.

(Signed) D. Lawrence Groner, Judge.

Oct. 16, 1924.

[fol. 19] In United States District Court

Order Directing Entry of Judgment—Filed July 3, 1924

Mr. S. M. Brandt, Seaboard Bank Building, Norfolk, Virginia, and Mr. Joseph M. Hurt, Jr., Travelers Building, Richmond, Virginia.

Dear Sirs: I have considered the letters of counsel in the above matter, and my conclusion is that the designation of the cars was sufficient.

The claim for extra equipment, I think should be allowed. This extra equipment, according to the evidence, was all placed on the cars after the conditional sales contracts were executed and recorded. The amount which is chargeable to this item is stated in the evidence at from $700.00 to $1,000.00. It was not itemized and it is doubtful whether the amount is exactly correct, and yet it is all the evidence that was before me on the subject. The case was regularly tried and I know of no good reason to re-open it and retry this question. The Clerk will, therefore, enter judgment for the plaintiff for seven hundred dollars ($700.00) and costs divided.

Yours very truly, D. L. G. D. Lawrence Groner, United States District Judge.

Copy to Mr. Joseph P. Brady, Clerk, Richmond, Va.

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING WRIT OF ERROR—Filed October 16, 1924

On this 16th day of October, 1924, came Henry W. Oppenhimer, Trustee in Bankruptcy for W. A. Lee, trading as National Motor Company, Bankrupt, by Joseph M. Hurt, Jr., his attorney, and filed herein and presented to the Court his petition praying for the allowance of a writ of error to the judgment entered herein on the 16th day of October, 1924, together with his assignment of errors intended to be urged by him, and praying also that a transcript of the record, proceedings, and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fourth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error.

(Signed) Groner, Judge.

[fol. 21] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2323

HENRY W. OPPENHIMER, Trustee in Bankruptcy for W. A. Lee, Trading as National Motor Company, Bankrupt, Plaintiff in Error,

versus

FINANCE AND GUARANTY COMPANY, Defendant in Error

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond

In Bankruptcy

Argued January 27, 1925. Decided May 4, 1925

Before Woods, Waddill, and Rose, Circuit Judges

Joseph M. Hurt, Jr., for plaintiff in error and S. M. Brandt for defendant in error.

Opinion—Filed in District Court October 29, 1925

[fol. 22] Rose, Circuit Judge:

The parties below occupied the same position they do in this Court; that is to say, Henry W. Oppenhimer, as Trustee in Bankruptcy for one W. A. Lee, trading as the National Motor Company, was there plaintiff and is plaintiff in error here, and the Finance and Guaranty Company, defendant in error here was defendant there. For brevity they will be referred to as the Trustee and the Vendor, respectively.

The bankrupt, one W. A. Lee, traded as the National Motor Company. No one else was interested in the business which was that of buying and selling automobiles. The Vendor financed the purchase of automobiles for Lee and was the vendor of the cars to him. The sale was made on the installment plan and by the agreements between the parties, which were duly recorded, the legal and equitable title to the automobiles was to remain in the Vendor until the final payment of the last installment of the purchase money and the performance by the bankrupt of the other terms of the agreement. These contracts contained other provisions, such as that the bankrupt could not mortgage, rent, pawn, dispose of, or sell, the property, without the permission of the Vendor, first obtained in writing. There is no question, however, that the bankrupt bought the automobiles to sell again and that the Vendor was at all times aware of this intention. The agreements, all substantially identical in form, bore date at various times from the 28th of April, 1921, to the 6th of August, in the same year.

On the 26th of December, 1921, Lee left Richmond, for parts unknown and so far as the record discloses, has not been heard of since. On the 10th of January, the Vendor instituted suit in detinue in the law and equity Court of the City of Richmond and in the initial affidavit, its duly authorized agents swore that there was good reason to believe that Lee was insolvent. In execution of the writ issued in the case, the sheriff of Richmond on the same day seized the automobiles and delivered them to the Vendor. Ten days later, on the 20th of January, an involuntary petition

in bankruptcy was filed against Lee and he was on the 25th of February adjudicated a bankrupt.

On the 15th of December, 1922, the Trustee filed a peti [fol. 23] tion in the instant proceeding against the Vendor alleging that the taking and possession by it of the four automobiles in question amounted to avoidable preference and praying an order for the return of the automobiles or the payment of the money value thereof. After hearing testimony, the learned Court below was of the opinion that the Vendor had acted within its rights and accordingly dismissed the petition.

The rights of the Trustee, if he has any, depend upon the so-called Traders' Act of Virginia, Section 5224, Code of 1919, which has been considered by this Court in the Chesapeake Shoe Co. vs. Soldner 122 Fed. 593 and in the Virginia Book Co. vs. Sites 254 Fed. 46, and in other cases. It has many times been construed by the highest Court of Virginia, as for example in Hoge vs. Turner 96 Va. 624, Edmunds vs. Hobbie Piano Co. 97 Va., 583, Partlow vs. Lickliter 100 Va. 631, Boice vs. Finance & Guaranty Co. 127 Va. 563, Nusbaum vs. City Bank & Trust Co. 132 Va. 54, Capitol Motor Corporation vs. Lasker 138 Va. 630. By these decisions, it is clearly settled—First, that the statute applies to a trader doing business in his own name under a general merchant's license whenever the goods of another are put in his possession with the intent on the part of the other that such goods shall form part of his ordinary stock of merchandise and be exposed for sale as such, without any notice being given on the premises that they are not the goods of the trader. Edmunds vs. Hobbie Piano Co. 97 Va. 588. Second, under such circumstances the goods are liable for the trader's debts, although the creditor seeking to hold them has actual knowledge of the circumstances under which they came into the trader's possession. Hoge vs. Turner 96 Va. 624. Third, that it makes no difference that the agreement between the merchant and the person entrusting the goods to him was in writing and was recorded. Boice vs. Finance & Guaranty Co. 127 Va. 563, Partlow vs. Lickliter 100 Va. 631. This third proposition seems to be the logical result of the second. Fourth, that the statute applies to automobiles and other bulky and valuable articles, susceptible of easy identification as well as to smaller ar

ticles exposed for sale by a dealer. Boice vs. Finance & Guaranty Co. 127 Va. 523, Nusbaum vs. City Bank & Trust Co. 132 Va. 54, Capital Motor Corporation vs. Lasker 138 [fol. 24] Va. 630. The first of the cases cited has reference to a dealer in automobiles who, from the street numbers, appears to have occupied the store next — that of the bankrupt in this case. Fifth, that goods in the possession of a merchant under the circumstances above stated are quoad his creditors his property. Nusbaum vs. City Bank & Trust Co. 132 Va. 54. Sixth, that where the vendor or owner of the goods entrusted to the merchant repossesses himself of them within four months before filing of the petition in bankruptcy, having good reason at the time to believe that his debtor is insolvent and that by repossessing himself he will obtain a payment of a larger proportion of his debt or what would have been his debt had he not so repossessed himself, than will be obtained by other creditors, he has secured a voidable preference and is answerable to the trustee therefor. Virginia Book Co. vs. Sites 254 Fed. 46. Seventh, that the title of a trustee under a conventional deed of trust or assignment for the benefit of creditors, does not antedate his deed and that the vendor has good title against such trustee and creditors represented by him of property of which he has so repossessed himself before the delivery of the deed of assignment. Capital Motor Corporation vs. Lasker 138 Va. 63.

These propositions are decisive of the case. The fact that in Capital Motor Corporation vs. Lasker 138 Va. 630, it was properly held that a trustee under a conventional assignment or a deed of trust for the benefit of creditors has no rights as against property of which the vendor or lienor repossessed himself before the delivery of the deed of trust or assignment, is in no wise in conflict with the law as it has been above stated. A conventional trustee has no power to vacate preferences.

It follows that the trustee in bankruptcy in this case was entitled to the relief for which he asked.

Reversed.

In United States Circuit Court of Appeals

Dissenting Opinion

Waddill, Circuit Judge, dissenting:

The appellee was the holder of a duly recorded conditional sales agreement covering the automobiles the subject of this appeal. Ten days prior to the filing of the petition in bankruptcy, it repossessed itself of the automobiles by a proceeding in a State court of competent jurisdiction, and was so in possession at the time of the bankruptcy. [fol. 25]

Under these conditions, I can but believe that appellee acquired title superior to that of the trustee in bankruptcy, whose status as a lienor under Section 47-A, Bankr. Act, 1910, became effective as of the date of filing the petition in bankruptcy. Martin v. Commercial Nat. Bank, 245 U. S. 513, 517; Fairbanks Shovel Co. vs. Wills, 240 U. S. 642, 649; Bailey v. Baker Ice Machine Co. 239 U. S. 268, 276; Woods v. Stemple, Rt. (C. C. A. 4th cir.) 289 Fed. 238; Capitol Motor Corporation v. Lasker, 138 Va. 630; Nusbaum v. City Bank, 132 Va. 54, 57.

In Virginia, it is well settled that "creditors" within the purview of the act in question here, means "lien creditors," that is, persons who have liens upon the property; and whatever may be the status of the trustee in bankruptcy in the enforcement of the rights of those who have such liens—that is to say, whether the title of such trustee in bankruptcy as to such lien creditors may relate back to a date ante dating the time of his appointment for the purpose of enforcing such liens, still, insofar as he represents the unsecured creditors, those having no fixed lien, his status as trustee cannot relate back prior to the time of the filing of the petition in bankruptcy in the proceeding in which he was appointed, so as to enable unsecured creditors to defeat the rights of vendors or lienors who have established their claims and liens.

True copy; Teste:

(Sgd.) Claude M. Dean, Clerk U. S. Circuit Court of Appeals, 4th Ct., by ——— ———, Deputy Clerk.

(Seal of Circuit Court.)

[fol. 26] UNITED STATES CIRCUIT COURT OF APPEALS

MANDATE—Filed in District Court October 29, 1925

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judge of the District Court of the United States for the Eastern District of Virginia, Greeting:

Whereas, lately in the District Court of the United States for the Eastern District of Virginia, before you or some of you, in a cause between Henry W. Oppenhimer, Trustee in Bankruptcy for W. A. Lee, trading as National Motor Company, Bankrupt, Plaintiff, and Finance and Guaranty Company, Defendant; wherein the judgment of the said District Court entered in the said cause on the 16th day of October, 1924, is in the words following, to wit:

"This day came the parties in the above action, by their attorneys, and by agreement of parties, trial by jury was waived, and all matters of law and fact are submitted to the Court, and the Court having fully heard the evidence, doth consider that the plaintiff recover of the defendant the sum of $700.00 and one-half of his costs herein, and no more." * * *

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Fourth Circuit by virtue of the writ of error sued out by the said Henry W. Oppenhimer, Trustee in Bankruptcy for W. A. Lee, trading as National Motor Company, Bankrupt, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the term of January, in the year of our Lord one thousand nine hundred and twenty five the said [fol. 27] cause came on to be heard before the said United States Circuit Court of Appeals for the Fourth Circuit, on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the

Eastern District of Virginia, at Richmond, with directions to set aside the verdict and grant a new trial in accordance with the opinion of this Court.

John C. Rose, U. S. Circuit Judge.

May 5, 1925.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in accordance with the opinion and the judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the twenty eighth day of October, in the year of our Lord one thousand nine hundred and twenty-five.

Claude M. Dean, Clerk of the U. S. Circuit Court of Appeals for the Fourth Circuit.

Costs of pltff. in error:

Clerk	$36 45
Printing Record	51 75
Supervising fee	11 25
Attorney	20 00
	$119 45

[fol. 28] Mandate. Richmond, Va., June 2, 1925, mandate stayed pending petition of defendant in error for rehearing. October 20, 1925, rehearing denied. Received and filed October 29th, 1925. (Sgd.) C. K. Moran, Deputy Clerk.

In United States District Court

[Title omitted]

[fol. 29] Judgment—Filed January 15, 1926

This day came again the parties in the above action, by their attorneys, and by agreement of parties trial by jury was waived, and all matters of law and fact were submit-

ted to the Court, and the Court having fully heard the evidence, doth consider that the plaintiff have and recover of the defendant the sum of $4,190.99, with lawful interest thereon from 15 Dec. 1922 until paid, together with his costs in this behalf expended. To which action of the Court the defendant by counsel excepted.

(Signed) D. L. G., Judge.

Jan. 14, 1926.

In United States District Court

[Title omitted]

Order Filing Bill of Exceptions—Filed February 20, 1926

This day came Finance and Guaranty Company by Counsel, and presented its Bill of Exceptions taken to various actions and rulings of the Court during the trial of this case and the same were signed, sealed and enrolled and ordered to be made a part of the Record in this case.

D. Lawrence Groner, United States District Judge.

Feb. 20, 1926.

In United States District Court

Bill of Exceptions—Filed February 20, 1926

Caption

Be it remembered that upon the trial of the above entitled action, neither party required a jury, and the whole matter [fol. 30] of law and fact was submitted to the Court under a stipulation in writing signed by counsel for the respective parties and filed with the papers in the cause. The stipulation in writing heretofore entered into between the parties waiving jury and submitting all questions of law and fact to the court is renewed to the same extent as if the same were herein specifically filed.

And thereupon the plaintiff, to maintain the issue on his part, introduced the following witnesses, all of whom were duly sworn, and testified as follows:

HENRY W. OPPENHIMER

Witness testified that he is Trustee in Bankruptcy of W. A. Lee, trading as National Motor Company, Bankrupt, having been appointed as such on March 22, 1920, the involuntary petition in bankruptcy having been filed on January 29, 1922; that soon after his appointment he went to the place of business of the bankrupt, which was locked up, getting the keys from the bankrupt's attorneys; said place of business bore the sign "National Motor Company"; he did not remember seeing any other signs and thought he would have remembered them had there been; after his appointment he ascertained that Bankrupt was insolvent; that Lee was not in possession of the automobiles sued for at the time petition was filed.

MRS. W. A. LEE

Witness testified that she is the wife of the Bankrupt, who had a place of business at 1629 West Broad Street, Richmond, Virginia, and did business under the trade name of National Motor Company, being sole owner of said unincorporated business, and which consisted of buying and selling Velie automobiles; that she worked there and kept his books and did his stenographic work and knew more about the business than her husband did; that her husband left town on December 26, 1921, and she had not heard from him since, and his place of business was shut up by him before he left town and not opened again for the conduct of [fol. 31] business until the officers entered it for the purpose of taking the cars; that at the time he left there were in the salesroom four new Velie automobiles and two second hand cars, and that Mr. W. R. Payne, a representative of the defendant, had previously been in the salesroom and had seen the Velie automobiles in there; that after he left she on one occasion went into the place of business with Mr. Wyatt, High Constable of the City of Richmond, who

levied she thought one a model 48 and three model 34, the 34's selling at the News Leader, the Velie cars at that time being also in there; that there was no sign posted which would indicate that the cars were not the property of the bankrupt nor was there any notice thereof given in the newspapers; that the four Velie cars were touring cars, one a model 48 and three model 34, the 34's selling at around $1,385.00 f. o. b. factory, and the 48 at between $1,500.00 and $1,800.00 f. o. b. factory, this being the price without extra equipment, such being the condition of the cars when the liens of defendant were put on the cars; that afterwards the model 48 was fully equipped with every extra equipment that could be put on an automobile and the other cars had extra equipment such as bumpers and pilot lights, and that the value of the extra equipment was between $800.00 and $1,000.00; that she was not certain of the nature of the lien which the defendant had on the cars; that the defendant kept in close touch with the bankrupt's condition and his representative had been there about a month prior to the time when he left, and had been pressing bankrupt for payment, and said they must have their money.

J. C. Crump

Witness testified that in January, 1922, he was Deputy Sheriff of the City of Richmond, Virginia, that he received a process of seizure from the Law and Equity Court of that City, a copy of which is filed with the Bill of Complaint, directing him to take possession of the four Velie automobiles mentioned in said process of seizure; that pursuant to said process on January 10th, 1924, he went to the place of business of the Bankrupt, at 1629 West Broad [fol. 32] Street, in Richmond, Virginia, along with a representative of the defendant, who pointed the automobiles out to him, that he found the place locked, dusty, and appearances indicated that it had been closed for a week or ten days; that he compared the numbers on the cars with the numbers on the process of seizure and took possession of the four automobiles and turned them over to the repre-

sentative of the defendant, taking from him a receipt, copy of which is filed with the Bill of Complaint, said representative giving an indemnifying bond for $8,000.00; that he did not notice any sign in the place indicating that the cars were not the property of the National Motor Company.

At the close of the foregoing testimony for the plaintiff, the defendant moved the Court to render a verdict for it, the defendant, but the Court overruled said motion, to which action of the Court the defendant, at the time of said ruling, excepted.

And thereupon the Defendant introduced the following witnesses all of whom were duly sworn, and testified as follows:

WILSON R. PAYNE

Witness testified that he is Superintendent of the Motor Department of the defendant, Finance and Guaranty Company, which position he has held for three years; that he was Special Representative of the Finance and Guaranty Company in April, 1921, which position he held in August, 1921; that it was necessary for him to be familiar with the cost price and market value of various makes of automobiles, including the Studebaker, Velie and Buick; that he was familiar with Velie cars for the reason that his Company was then financing one of the largest dealers of the City of Baltimore, the Sykes Auto Company, whose place of business he had occasion to visit two or three times a week and in connection with this financing, it came under his Department to dispose of slightly used cars; that the cars which are the subject of this litigation were sold to the National Motor Company on the 28th day of April, 1921, [fol. 33] by his Company under conditional sales contracts which are in evidence, one of which said contracts is dated April 28, 1921, known as Exhibit "B" and one of which said contracts is dated the 6th day of August, 1921, known as Exhibit "C," which said contracts covered the Velie automobiles which are the subject of this suit; that said automobiles were new cars at the time of their delivery; that according to the evidence heretofore introduced

in this case at the previous trial had thereof, these cars were sued for on the 10th day of January, 1922, and seized in an action of detinue instituted in the Court of Law and Equity of the City of Richmond; that at the time of their seizure, he knew of their quality and mechanical condition because he had had occasion to come to Richmond several times to audit these cars and was in a particularly good position or fair position to judge as to the treatment they were reported to be getting while here in Mr. Lee's custody; that he remembers distinctly one morning he came to audit the cars after they had become overdue and Mr. Lee had asked him to hold off. He never questioned our title to the cars but one of the cars was coming up Broad Street with a tow line attached and great big heavy touring car being towed by this brand new floor car, and he explained to me they had rebored the motor and put new piston rings in and it was impossible for a man to crank it and they were towing it with this car to ease it up so it would run, using their new car for towing this old one which he did not like and told Mr. Lee that he was very much disappointed in the way the cars were treated. Several times later when he came down he found that the cars were out and that persons were using them and he simply said this to show the depreciation on the cars and *it* remembers distinctly that the car he saw towing was the car that had the extra equipment, which consisted of a nickel radiator, nickel bumper, spot light, parking light and extra heavy special headlights nickel; that the cost of the extra equipment, based upon having replaced parts of that character, was at least $125.00. The headlights are expensive and when these cars came back to Baltimore, he had to put a new rear end into the one that was doing the towing, which cost eighty some dollars for the job; that he got the parts for the job from the Velie Agency in Baltimore, at the best [fol. 34] price he could get them and that the Sykes Motor Company of Baltimore gave them the best price, because at that time they had about $175,000 outstanding with this Company; that the effect of handling this car in this way was to depreciate its value and that it was not a new car; that the fair market value of the cars, which are the subject of this suit, on the 10th day of January, 1922, they

then being a year old, because new models on all automobiles came out by September 15th, 1922, and these cars had been classified as a year old, they would be a year old if they had stayed on the dealer's floor and never been taken out for demonstration, after a new model comes out which as the usual thing, will drop the price $300.00 to $400.00, and this is a conservative estimate; that there was a change in prices between the dates that these cars were acquired by the National Motor Company, the price having been reduced; that the new models had a different motor, the old models having a Fall motor and the new models had motors manufactured by the Velie Company; that even if the cars had not been used as he stated they had been, by reason of the change of models, they would depreciate $300.00 or $400.00 each being considered a year old; that he had seen Mrs. Lee driving one of the models on three or four occasions, not for demonstration purposes; that they had been depreciated to the extent that it was impossible to dispose of them as new automobiles; that the tires showed it; that an examination of the motor by raising the hood would disclose that the cars had been used; that the cushions were crushed and shiny; that the body had become worn where the door was opened; that they gave evidence of wear. Taking into account all of these matters, that on the 10th day of January, 1922, when the cars were seized, each one of the cars had dropped easily approximately $400.00 in value and that this is a conservative estimate; that it is their practice when they sue for the recovery of an automobile, to put a fair market value on the car so as to obtain as much from the sale as they possibly can, after they are repossessed and that they do not depreciate the value of the cars when they sue for them. Taking into consideration that the car were in the defendant's possession from the 10th of January, 1922, until the 15th of February, 1924, approximately; that they were inspected by Mr. All on December 12, 1923; that the fair [fol. 35] cash market value of these four automobiles on the 12th day of December, 1923, which was about two years after their repossession, based on the ability to purchase any one of these cars at from $350.00 to $400.00, this being a high estimate, they having been on storage during all of

this time at the cost of $6.00 per month or $24.00 per month, for all fours cars, and based on the standard value of automobiles as evidenced by a book published by the National Automobile Used Car Market Report Red Book; that at the time of the second trial of this case on January 15, 1926, these Velie Touring cars were valued at $36.00 a piece, but that on December 12, 1923, when these cars were inspected by Mr. All that they were not worth in excess of $400.00 or $500.00 a piece and that $500.00 for each car would probably be too high a value.

On cross-examination:

He knew that these cars had been in use while in possession of the National Motor Company, Bankrupt, because he had checked them himself; that it is not a custom for automobile dealers to use their new cars, since they have specific instructions from his Company not to use the cars at all; that this man Lee did use these cars but he criticized him for it and he did not do anything about it because Mr. Lee was in a better position, he thought, to dispose of the cars, having the Richmond Agency, than he was; that he did not know what cars Lee had on hand at the time of the bankruptcy; that he was not in a position to state what cars were on sale by Lee when he observed these cars; that he does not know how many cars he had, he was only interested in his Company's cars, each of which showed visible signs of use which would automatically render these cars used cars; that each one of the cars showed sufficient use to be classified as a used car; that for some years the factories have been in the habit of placing on the market the succeeding year's model about the 15th of September of the previous year and now the model for the succeeding year is put on the market in the mid-summer, but he does not know the figures given when the cars were repossessed, this was arranged through Mr. Crowder, who was later killed; the bond he thought was arranged through the [fol. 36] United States Fidelity and Guaranty Company of Baltimore, Maryland, upon which they paid a premium; that with respect to making the bond small in order to make the premium likewise small, the practice is to pick out two or three disinterested persons and let them estimate the valuation; that Mrs. Lee would come down and look out for

things in connection with Mr. Lee's business when he was incapacitated; that she had a regular bookkeeper and stenographer and he assumed that she knew about the prices of the cars from the invoices from the factory.

CHARLES W. CROWDER

Witness testified that he is a practicing attorney in Richmond, Virginia, that he instituted the proceedings in the Law and Equity Court of Richmond for the repossession of the cars by the defendant here; that it was on his advice the cars were repossessed; that W. O. Holmes, the representative of the defendant, made the affidavit for seizure; that he did not feel safe to let the property stay in the possion of Lee; that at that time he knew that Lee's place of business had been shut up, and that Lee had left town.

STIPULATION AS TO CERTAIN FACTS

It is stipulated and agreed as follows:

It is agreed that these cars were yet in the possession of the defendant Finance and Guaranty Company on December 12, 1923, at which time Mr. W. L. All of Messrs. Venable, Baecher and Howard of Baltimore, Maryland, acting for and on behalf of the Trustee, plaintiff herein, and Mr. J. B. Jones, acting for and on behalf of the Finance and Guaranty Company inspected these cars in the City of Baltimore, that is the cars involved in this suit, and it is further stipulated and agreed that said automobiles which are the subject of this suit were disposed of finally by the Finance and Guaranty Company on or about the 15th day of February, 1924, and that demand was made by the Trustee in Bankruptcy for the delivery of the cars to him on the 25th of February, 1922, which demand was refused by the Finance & Guaranty Company.

[fol. 37] MOTION FOR DIRECTED VERDICT

At the close of all the testimony, the defendant moved the Court to render a verdict for the defendant on the ground, as based on the evidence adduced, that the plaintiff is not entitled to recover, but the Court overruled said motion to which ruling of the Court at the time thereof, the defendant excepted.

And the Court certifies that the foregoing is all the evidence introduced on either side, reduced to narrative form.

JUDGMENT

Thereupon the Court rendered its judgment as follows:

"This is the second trial of this case. At the first trial I held that the trustee in bankruptcy was not entitled to recover the cars or their alternate value because it appeared that the cars in question had been purchased by the bankrupt very largely as the result of money furnished by the defendant who had then and there taken a conditional sales contract and had duly recorded the same and thereafter and prior to the filing of the petition in bankruptcy had, by proper legal proceedings in the State Court, repossessed itself of the cars. On appeal the Circuit Court of Appeals had decided, as I interpret the opinion of that Court, that under Section 5224 of the Code of Virginia, 1919, known as the Traders Act, the attempted reservation of the title or conditional sales contract was a nullity and that the attempt to repossess the cars by virtue of that reservation of title or conditional sales contract within four months created a voidable preference which the trustee had a right to have set aside. In deference to the decision of the Circuit Court of Appeals, I am constrained to enter judgment for the trustee in bankruptcy for the value of the property so taken by the defendant and fix the value and the amount for which judgment should be entered at $4,190.99 with interest from December 15, 1922, until paid."

MOTION FOR NEW TRIAL AND ORDER OVERRULING SAME

The defendant by Counsel, moved the Court to set aside its verdict and judgment and grant the defendant a new trial on the ground that the verdict is contrary to the law and the evidence and assign the following grounds for its motion:

[fol. 38] 1st. That the so-called Traders Act which is the foundation rock of this suit, has no application to this case as disclosed by the evidence adduced.

2nd. That the defendant having repossessed under a valid, binding conditional sales contract duly of record, property upon which it had a valid lien and proper reservation of title in it, prior to the filing of the petition, that the rights of the trustee in bankruptcy were fixed as of the day of the filing of the petition and the trustee having no lien at the time of the repossession of the property by the defendant is without any rights in this case.

3rd. That in no event is the trustee entitled to recover since the bankrupt never had any title of any kind to the property sought to be recovered in this suit or any claim thereon.

4th That the judgment rendered by the Court is excessive because the amount of recovery should be the value of the cars as of January 15, 1926, the date upon which this trial was had.

Which motion the Court overruled, to which action of the Court the defendant at the time thereof excepted.

MOTIONS FOR DIRECTED VERDICT

Be it further remembered that upon the trial of this case, it having been stipulated and agreed that the entire matter of law and fact should be submitted to the Court and after all the evidence had been introduced on behalf of the plaintiff, all of which is hereinbefore fully set out and made a part of the record in this case, the defendant, by Counsel, moved the Court to find a verdict for the defendant on the ground that under said evidence the plaintiff was not en-

titled to recover the property which is the subject of this suit, which motion the Court overruled and to which action of the Court the defendant then and there duly excepted.

And be it further remembered that on the trial of this case, upon the stipulation that the entire matter of law and fact should be submitted to the Court, at the completion of all of the evidence in this case, all of which is hereinbefore set out and made a part of the record in this case, the de- [fol. 39] fendant by Counsel moved the Court to find a verdict for the defendant on the ground that under the evidence adduced the plaintiff was not entitled to recover in this action, which motion the Court overruled and to which action of the Court the defendant then and there duly excepted.

MOTION FOR NEW TRIAL.

And be it further remembered that on the trial of this cause as aforesaid, and after the Court had rendered its verdict and judgment herein, all of which is hereinbefore set out and made a part of the record in this case, the defendant moved the Court to set aside its verdict and judgment and grant the defendant a new trial upon the ground that the verdict is contrary to the law and the evidence and assign the following grounds for its motion:

1st. That the so-called Traders Act which is the foundation rock of this suit, has no application to this case as disclosed by the —

2nd. That the defendant having repossessed under a valid, binding conditional sales contract duly of record, property upon which it had a valid lien and proper reservation of title in it, prior to the filing of the petition, that the rights of the trustee in bankruptcy were fixed as of the day of the filing of the petition and the trustee having no lien at the time of the repossession of the property by the defendant is without any rights in this case.

3rd. That in no event is the trustee entitled to recover since the bankrupt never had any title of any kind to the property sought to be recovered in this suit or any claim thereon.

4th. That the judgment rendered by the Court is excessive because the amount of recovery should be the value of the cars as of January 15, 1926, the date upon which this trial was had,

all of which is hereinbefore fully set forth and made a part of the record in this case, which motion the Court overruled and to which action of the Court in rendering and entering judgment against the defendant as aforesaid and in overruling the defendant's motion for a new trial and in denying [fol. 40] ing the defendant's several motions for a directed verdict as herein set forth, to each of them, the defendant, by its Attorney, duly excepted, and now tenders this its Bill of Exceptions which it prays may be signed, sealed and made a part of the record in this case, which is accordingly done.

Given under my hand and seal this 20th day of February, 1926.

D. Lawrence Groner, United States District Judge. (Seal.)

Feb. 20, 1926.

In United States District Court

Exhibit "B" in Evidence

5m-1 28 21 f-B. Co.

Finance & Guaranty Co.

Selling Price: ——. Freight and Charges: ——. Finance Charges: ——. Time Price: ——.

Conditional Sale Agreement

This agreement, made in triplicate at Baltimore, Md., this 28th day of April, 1921, between (Purchaser:) National Motor Co., residing or carrying on business at and whose address is number 1629 W. Broad Street, City of Richmond, County of ——, State of Virginia, hereinafter called Vendee, and (Dealer:) Finance & Guaranty Co., residing or carrying on business at and whose address is Baltimore, Md., hereinafter called Vendor:

Witnesseth: That in consideration of $1, interchangeably paid, receipt whereof is hereby acknowledged, Vendee has agreed to purchase and Vendor has agreed to sell, upon terms and conditions hereinafter set forth, personal property consisting of — (3) Velie Tourings Automobile-, Factory Number- 114857, 114882, 114892, Motor Number- [fol. 41] —, regularly equipped and extra equipment as follows——.

And this agreement further witnesseth:

1. That Vendee has this day obtained from Vendor the said personal property valued at Thirty Seven Hundred, Thirty-one and 06/100 Dollars ($3,731.06) and interest, for and upon which Vendee has paid $932.77, this day and has promised and hereby does promise to pay (in addition to the other payments and other obligations hereinafter promised and provided for) the sum of Twenty-seven Hundred Ninety-eight and 29/100 Dollars ($2,798.29) 10 days after date, each on the — day of each month hereafter.

2. That Vendee concedes, admits and covenants that the title of all said personal property now is and is to remain vested in Vendor, and that no title either legal or equitable, shall vest in Vendee, except as Bailee, until each and every instalment of the said purchase money has been paid, and each and every obligation of Vendee performed, in accordance with the stipulations hereinafter and hereinbefore set forth, when Vendor will deliver to Vendee a proper bill of sale, upon Vendee's request and payment of attorney's fee therefor.

Vendee promises and covenants:

3. That Vendee will punctually pay each and every instalment of the said purchase price to Vendor on the several days and times when the same shall become due; that Vendee will keep said property in first class condition and repair and working order, and will make all repairs to the satisfaction of Vendor, and will bear all risk of loss of said property and of damage thereto from any cause whatsoever, and will return the same, upon failure by Vendee to comply with the terms of this agreement, in as good condition as reasonable and proper use will permit; that

Vendee will not mortgage, rent, p. n, dispose of or sell th· [fol. 42] said property or any part or parts thereof or accessory or accessories thereto, or in any manner part with the possession thereof, or remove the same from the State of Maryland, except during the temporary use without the permission of Vendor first obtained in writing, and Vendee will at any time, when so requested furnish Vendor with a written sworn statement showing the whereabouts and conditions of said property, whether in active service or withdrawn therefrom, and the cause of any such withdrawal, and will exhibit said property, whether in active service or withdrawn therefrom, and the cause of any such withdrawal, and will exhibit said property to Vendor or its agent and will give immediate notice by telephone and by letter, enclosed in a post paid wrapper addressed to Vendor at its address, first hereinabove given and deposited in a United States postoffice station or letter box, of any demand to levy under any legal proceedings or of any writ issued against or laid upon said property, and of any claims whatsoever against or upon said car by any person other than Vendor.

4. That Vendee will, at Vendee's own expense, keep the said property and all of it fully protected for the benefit of Vendor until the purchase price and all claims against Vendee under this contract shall have been paid in full, by policies of insurance covering the hazards of fire, theft, loss and collision, in insurance companies satisfactory to Vendor, and will deliver said policies to Vendor, and that said policy shall be issued to and the loss upon said policies shall be payable to Vendor and Vendee as their respective interests may appear; and the amount received thereon by Vendor shall be applied by it on account of the purchase price of the aforesaid property then remaining unpaid, and Vendee expressly covenants that if Vendee should fail or neglect to furnish Vendor with such policies of insurance at the time Vendee takes possession of the above mentioned property then Vendor, at Vendor's option, may insure the said property as aforesaid for its full value, and the amount paid or incurred by Vendor for the cost of premiums upon such insurance with interest thereon, shall constitute a part of the purchase price of the said property and shall be added thereto as hereinafter provided.

5. That any and all amounts actually paid out or liabil-
[fol. 43] ities incurred by Vendor in connection with (a) any retaking or any attempted retaking of said property, or of any part thereof, whether in an action of replevin or otherwise, or (b) with a sale thereof after such retaking or (c) with defending or asserting or attempting to defend or assert Vendor's title, including (1) all expenses of repairs and repairing for and conducting sale, (2) storage, (3) attorney's fees, expenses and ordinary and necessary disbursements, (4) fees of public officers and officials, (5) taxable costs, (6) expenses and charges of employes, (7) supplies, (8) transportation and (9) and other expenses which may be paid or incurred by Vendor and not expressly enumerated herein, together with cost of insurance as hereinbefore provided, with interest on all thereof, shall constitute a part of the purchase price and of the agreed value of said property, and may be added to the last instalment of such purchase price as hereinabove covenanted to be paid, and Vendor may retain from the proceeds of any sale of above mentioned property the amount due upon this contract which shall include the amount of all expenses as above set forth, and Vendee expressly promises and covenants that if the proceeds of sale should not be sufficient to pay the amount due Vendor, including all such expenses then, upon demand, Vendee personally will pay the deficiency.

It is further understood and agreed that:

6. If default be made in the payment of any of the said sums herein mentioned, as they shall respectively become due (whether evidenced by promissory notes or otherwise) or if Vendee shall attempt to sell, pawn or dispose of, or shall misuse or injure the said property or any part thereof, or in any manner not comply with this agreement, or shall fail to perform or observe any covenant or condition of this agreement whatsoever, or if the said property or any thereof shall be attached, levied upon or in any way subjected to process, then it shall be lawful for said Vendor and the said Vendee hereby authorizes and empowers Vendor and Vendor's attorneys or agents, with or without force or process of law, to enter upon or into any place or places where the

said property or any part thereof is or is reasonably be-
[fol. 44] lieved to be and to take away and repossess the said property without any opposition or molestation by or from Vendee or Vendee's agents or servants whatsoever.

7. If Vendee shall fail to pay any instalment of the purchase price, as and when it shall become due, or if a receiver of Vendee's property shall be appointed, or if a petition in bankruptcy shall be filed by or against Vendee, or if Vendee shall fail to perform any covenant or condition of this agreement herein provided to be performed by said Vendee, or if the said property or any thereof shall be attached, levied upon or in any way subjected to process, then, at the option of the Vendor, the entire purchase price shall forthwith be and become due and payable, notwithstanding any notes which may have been given by Vendee as representing the purchase price or any part thereof shall not by their terms have become due and payable.

8. Any notes which may be given by Vendee as representing the purchase price of the property, or any part thereof, shall not be deemed payments and shall not effect Vendor's title to the property unless the notes are paid in full as they shall respectively mature, and no attempt upon the part of the Vendor to collect upon any such notes, either by legal proceedings or otherwise, shall operate as an election of remedies which will preclude the Vendor on the non payment of any such notes or any judgment obtained thereon from asserting its right to the possession of the said property.

9. Vendee expressly waives any and all requirements of the statutes of the State of Maryland, and of any other State, county or jurisdiction, within which such property may be at any time, during the life of this agreement, (whether now in effect or which may become effective prior to the payment in full by Vendee of the purchase price of the above mentioned property) that in case the said property or any part or parts thereof should be retaken by Vendor or Vendor's successor in interest, it or they should be retained for any period whatever from the time of such retaking and that the Vendor should be required to sell such property or any part or parts thereof

within any limited time after retaking the same, and Vendee [fol. 45] further waives any requirements of any such statutes that the said property should be sold at public auction and as to notice of sale thereof, and Vendee expressly authorizes and consents to a sale of such property as so retaken without notice at private sale, or otherwise, at the option of the Vendor, and without any requirement that such sale should occur at any particular time or at the place where such property should then be located, and Vendee further covenants, consents and agrees that upon any sale of such property Vendor may become the purchaser thereof and shall hold the same thereafter in Vendor's own right and absolutely.

10. Each and every right and remedy herein specifically given to Vendor shall be cumulative, and may be exercised in addition to every other right or remedy herein specifically given, or now or hereafter existing at law or in equity or by statute. In case any of the provisions of this contract should be held invalid, the remaining provisions shall not be effected by such invadility. Each right, privilege or benefit herein conferred and granted or attempted to be conferred and granted upon or to the Vendor is and is intended to be a separate and distinct right, privilege and benefit, and the validity of any one or more of them shall not effect the remainder.

11. No delay or omission of Vendor or of any of the holders of any notes given to evidence any of the payments hereinabove promised to be made, in the exercise of any right or remedy accruing upon default hereunder, or thereunder, shall impair any such right or remedy or shall be construed to be a waiver of such default, or an acquiescence therein, nor shall the acceptance by Vendor or by any of the holders of any of said notes of any security, or of any payment by or on account of the balance of said purchase price, or the principal of any of said notes, be deemed a waiver of any defaults.

12. Any and all notices and demands arising under or having reference to this agreement or to any claims, sales or proceedings hereunder, or under any statute applicable to the subject matter or any part of the subject matter

hereof, shall be sufficient notices and demands and shall be deemed to have been received by and served upon Vendee, when deposited in any post office, station or letter box under [fol. 46] the control of the United States Government, enclosed in a postpaid envelope addressed to Vendee and directed to such Vendee at Vendee's address as first hereinabove given, which is the address of Vendee's place of residence if Vendee is an individual and of its principal place of business if a corporation.

No clause in or stipulation of this agreement shall be deemed rescinded as against Vendor unless such rescission is in writing and signed by Vendor, or by an executive officer of Vendor, if Vendor is a corporation, and each and every right, privilege and benefit herein given to Vendor shall apply, extend to and devolve upon Vendor's successors and assigns.

In testimony whereof, said Vendee and Vendor have caused these presents to be executed the day and year first above written.

National Motor Co., (Purchaser,) by (Signed) W. A. Lee, Mgr. (L. S.) Finance & Guaranty Co., (Dealer,) by (Signature undecipherable,) Treas. (L. S.)

Attest: (Signed) Carrie L. Lee, E. M. Fox, (Two Subscribing Witnesses.)

Exhibit "C" in Evidence

5m-1 28 21-f B. Co.

Finance & Guaranty Co.

Selling Price: ——. Freight and Charges: ——. Finance Charges: ——. Time Price: ——.

[fol. 47] Conditional Sale Agreement

This agreement, made in triplicate at Baltimore, Md., this 6 day of August, 1921, between (Purchaser:) National Motor Co., residing or carrying on business at and whose

address is number 1629 W. Broad St., Street, City of Richmond, County of ——, State of Virginia, hereinafter called Vendee, and (Dealer:) Finance & Guaranty Company, residing or carrying on business at and whose address is Baltimore, Md., hereinafter called Vendor:

Witnesseth: That in consideration of $1, interchangeably paid, receipt whereof is hereby acknowledged, Vendee has agreed to purchase and Vendor has agreed to sell, upon terms and conditions hereinafter set forth, personal property consisting of 3 Velie Tourings

( )

Motor trucks, Model

78197 I serial no. Automobile
Factory Number 115969 " " Motor Number
116036 " "

regularly equipped and extra equipment as follows:
48215 6706 7345

And this agreement further witnesseth:

1. That Vendee has this day obtained from Vendor the said personal property valued at Thirty Six Hundred Forty Seven and 31/100 Dollars ($3,647.31) and interest, for and upon which Vendee has paid $911.83, this day and has promised and hereby does promise to pay (in addition to the other payments and other obligations hereinafter promised and provided for) the sum of Twenty Seven Hundred Thirty-five & 48/100 Dollars ($2,735.48) 10 days after date, each on the — day of each month hereafter, with interest after maturity at 6%.

[fol. 48] 2. That Vendee concedes, admits and covenants that the title of all said personal property now is and is to remain vested in Vendor, and that no title either legal or equitable, shall vest in Vendee, except as Bailee, until each and every instalment of the said purchase money has been paid, and each and every obligation of Vendee performed, in accordance with the stipulations hereinafter and hereinbefore set forth, when Vendor will deliver to Vendee a

proper bill of sale, upon Vendee's request and payment of attorney's fee thereof.

Vendee promises and covenants:

3. That Vendee will punctually pay each and every instalment of the said purchase price to Vendor on the several days and times when the same shall become due; that Vendee will keep said property in first-class condition and repair and working order, and will make all repairs to the satisfaction of Vendor, and will bear all risk of loss of said property and of damage thereto from any cause whatsoever, and will return the same, upon failure by Vendee to comply with the terms of this agreement, in as good condition as reasonable and proper use will permit; that Vendee will not mortgage, rent, pawn, dispose of or sell the said property or any part or parts thereof or accessory or accessories thereto, or in any manner part with the possession thereof, or remove the same from the State of ——, except during the temporary use without the permission of Vendor first obtained in writing, and Vendee will at any time, when so requested furnish Vendor with a written sworn statement showing the whereabouts and conditions of said property, whether in active service or withdrawn therefrom, and the cause of any such withdrawal, and will exhibit said property, whether in active service or withdrawn therefrom, and the cause of any such withdrawal, and will exhibit said property to Vendor or its agent and will give immediate notice by telephone and by letter, enclosed in a post paid wrapper addressed to Vendor at its address, first hereinabove given and deposited in a United States postoffice station or letter box, of any demand to levy under any legal proceedings or of any writ issued against or laid upon said property, and of any claims whatsoever against or upon said car by any person other than Vendor.

[fol. 49] 4. That Vendee will, at Vendee's own expense, keep the said property and all of it fully protected for the benefit of Vendor until the purchase price and all claims against Vendee under this contract shall have been paid in full, by policies of insurance covering the hazards of fire, theft, loss and collision, in insurance companies satisfactory to Vendor, and will deliver said policies to Vendor, and

that said policy shall be issued to and the loss upon said policies shall be payable to Vendor and Vendee as their respective interests may appear; and the amount received thereon by Vendor shall be applied by it on account of the purchase price of the aforesaid property then remaining unpaid, and Vendee expressly covenants that if Vendee should fail or neglect to furnish Vendor with such policies of insurance at the time Vendee takes possession of the above mentioned property, then Vendor, at Vendor's option, may insure the said property as aforesaid for its full value, and the amount paid or incurred by Vendor for the cost of premiums upon such insurance with interest thereon, shall constitute a part of the purchase price of the said property and shall be added thereto as hereinafter provided.

5. That any and all amounts actually paid out or liabilities incurred by Vendor in connection with (a) any retaking or any attempted retaking of said property, or of any part thereof, whether in an action or replevin or otherwise, or (b) with a sale thereof after such retaking or (c) with defending or asserting or attempting to defend or assert Vendor's title, including (1) all expenses of repairs and repairing for and conducting sale, (2) storage, (3) attorney's fees, expenses and ordinary and necessary disbursements, (4) fees of public officers and officials, (5) taxable costs, (6) expenses and charges of employes, (7) supplies (8) transportation and (9) *and* other expenses which may be paid or incurred by Vendor and not expressly enumerated herein, together with cost of insurance as hereinbefore provided, with interest on all thereof, shall constitute a part of the purchase price and of the agreed value of said property, and may be added to the last instalment of such purchase price as hereinabove covenanted to be paid, and Vendor may retain from the proceeds of any sale of above mentioned property the amount due upon this contract [fol. 50] which shall include the amount of all expenses as above set forth, and Vendee expressly promises and covenants that if the proceeds of sale should not be sufficient to pay the amount due Vendor, including all such expenses, then, upon demand, Vendee personally will pay the deficiency with interest.

It is further understood and agreed that:

6. If default be made in the payment of any of the said sums herein mentioned, as they shall respectively become due (whether evidenced by promissory notes or otherwise) or if Vendee shall attempt to sell, pawn or dispose of, or shall misuse or injure the said property or any part thereof, or in any manner not comply with this agreement, or shall fail to perform or observe any covenant or condition of this agreement whatsoever, or if the said property or any thereof shall be attached, levied upon or in any way subjected to process, then it shall be lawful for said Vendor and the said Vendee hereby authorizes and empowers Vendor and Vendor's attorneys or agents, with or without force or process of law, to enter upon or into any place or places where the said property or any part thereof is or is reasonably believed to be and to take away and repossess the said property without any opposition or molestation by or from Vendee or Vendee's agents or servants whatsoever.

7. If Vendee shall fail to pay any instalment of the purchase price, as and when it shall become due, or if a receiver of Vendee's property shall be appointed, or if a petition in bankruptcy shall be filed by or against Vendee, or if Vendee shall fail to perform any covenant or condition of this agreement herein provided to be performed by said Vendee, or if the said property or any thereof shall be attached, levied upon or in any way subjected to process, then at the option of the Vendor, the entire purchase price shall forthwith be and become due and payable, notwithstanding any notes which may have been given by Vendee as representing the purchase price or any part thereof shall not by their terms have become due and payable.

[fol. 51] 8. Any notes which may be given by Vendee as representing the purchase price of the property, or any part thereof, shall not be deemed payments and shall not effect Vendor's title to the property unless the notes are paid in full as they shall respectively mature, and no attempt upon the part of the Vendor to collect upon any such notes, either by legal proceedings or otherwise, shall operate as an election of remedies which will preclude the Vendor on the non payment of any such notes or any judgment obtained

thereon from asserting it- right to the possession of the said property.

9. Vendee expressly waives any and all requirements of the statutes of the State of ——, and of any other State, county or jurisdiction, within which such property may be at any time, during the life of this agreement, (whether now in effect or which may become effective prior to the payment in full by Vendee of the purchase price of the above mentioned property) that in case the said property or any part or parts thereof should be retaken by Vendor or Vendor's successor in interest, it or they should be retained for any period whatever from the time of such retaking and that the Vendor should be required to sell such property or any part or parts thereof within any limited time after retaking the same, and Vendee further waives any requirements of any such statutes that the said property should be sold at public auction and as to notice of sale thereof, and Vendee expressly authorizes and consents to a sale of such property as so retaken, without notice at private sale, or otherwise, at the option of the Vendor, and without any requirement that such sale should occur at any particular time or at the place where such property should then be located and Vendee further covenants, consents and agrees that upon any sale of such property Vendor may become the purchaser thereof and shall hold the same thereafter in Vendor's own right and absolutely.

10. Each and every right and remedy herein specifically given to Vendor shall be cumulative, and may be exercised in addition to every other right or remedy herein specifically given, or now or hereafter existing at law or in equity or by statute. In case any of the provisions of this con- [fol. 52] tract should be held invalid, the remaining provisions shall not be effected by such invalidity. Each right, privilege or benefit herein conferred and granted or attempted to be conferred and granted upon or to the Vendor is and is intended to be a separate and distinct right, privilege and benefit, and the validity of any one or more of them shall not effect the remainder.

11. No delay or omission of Vendor or of any of the holders of any notes given to evidence any of the payments

hereinabove promised to be made, in the exercise of any right or remedy accruing upon default hereunder, or thereunder, shall impair any such right or remedy or shall be construed to be a waiver of such default, or an acquiescence therein, nor shall the acceptance by Vendor or by any of the holders of any of said notes of any security, or of any payment by or on account of the balance of said purchase price, or the principal or interest of any of said notes, be deemed a waiver of any defaults.

12. Any and all notices and demands arising under or having reference to this agreement or to any claims, sales or proceedings hereunder, or under any statute applicable to the subject matter or any part of the subject matter hereof, shall be sufficient notices and demands and shall be deemed to have been received by and served upon Vendee, when deposited in any postoffice, station or letter box under the control of the United States Government, enclosed in a postpaid envelope addressed to Vendee and directed to such Vendee at Vendee's address as first hereinabove given, which is the address of Vendee's place of residence if Vendee is an individual and of its principal place of business if a corporation.

13. No clause in or stipulation of this agreement shall be deemed rescinded as against Vendor unless such rescission is in writing and signed by Vendor, or by an executive officer of Vendor, if Vendor is a corporation, and each and every right, privilege and benefit herein given to Vendor shall apply, extend to and devolve upon Vendor's successors and assigns.

In testimony whereof, said Vendee and Vendor have [fol. 53] cause these presents to be executed the day and year first above written.

National Motor C., (Purchaser,) by (Signed) W. A. Lee, Mgr. (L. S.) Finance & Guaranty Company, (L. S.) Dealer,) by (Signature undecipherable,) Treas.

Attest: (Signed) Carrie L. Lee, Edyth M. Fox, (Two subscribing witnesses.)

In United States District Court

Assignments of Error—Filed February 20, 1926

And the defendant now assigns as error in connection with its petition for writ of error and says that in the record and proceedings and in the final judgment aforesaid manifest error has been committed to the prejudice of the defendant in error, in this, to wit:

1

That the Court erred in denying the defendant's motion to direct a verdict in its favor at the close of the plaintiff's testimony.

2

That the Court erred in denying the defendant's motion to direct a verdict in its favor at the close of all of the testimony.

3

That the Court erred in holding that the so called Traders Act applies to the automobiles which are the subject of this

[fol. 54] 4

That the Court erred in holding that the defendant's title to the automobiles, which are the subject of this suit, was not valid as against the trustee in bankruptcy—the plaintiff herein—and in holding the defendant's reservation of title to said property was invalid.

5

That the Court erred in holding that the plaintiff's rights to the possession of the automobiles which are the subject of this suit, was prior and greater than that of the defendant in that in so holding the Court held that the trustee in bankruptcy's right attached to the property to which the bankrupt never had title.

6

That the Court erred in holding that the repossession by the defendant of its own property under a valid conditional sales contract duly recorded, was a voidable preference as against the trustee in bankruptcy.

7

The Court erred in fixing the value of the automobiles which are the subject of this suit at Four Thousand ($4,000.00) Dollars, because the evidence does not support such valuation and the valuation thereof should have been determined as of the time of the determination of the trustee in bankruptcy's title thereto.

By reason whereof the plaintiff in error prays that the judgment aforesaid may be reversed.

(Signed) S. M. Brandt, Attorney for Defendant in Error.

[fol. 55] In United States District Court

Memoranda of Clerk re Certain Papers

Petition for writ of error filed February 20th, 1926.

Order allowing writ of error and fixing amount of writ of error and supersedeas bond entered and filed Feby. 20, 1926.

Writ of error and supersedeas bond approved and filed Feby. 26, 1926; dated February 25th, 1926; penalty: Six thousand dollars ($6,000.00); obligors: Finance & Guaranty Company and United States Fidelity & Guaranty Company; conditioned to pay all costs.

Writ of error issued February 23rd, 1926.

Citation, dated February 23rd, 1926. Legal service accepted on the 2nd day of March, 1926, by Joseph M. Hurt, Jr., attorney for Defendant in Error.

[fol. 56] IN UNITED STATES DISTRICT COURT

STIPULATION RE TRANSCRIPT OF RECORD—Filed February 20, 1926

It is hereby stipulated between counsel for the parties to this cause that the record herein shall consist of the following:

1. The pleadings, including the Declaration originally filed as a Bill of Complaint, and exhibits filed therewith, the motion to dismiss, the motion to transfer cause to law side of Court, and all orders entered in this cause.

2. The opinions or memoranda of the Court on the first trial and this trial, and the opinion of the Circuit Court of Appeals reversing the judgment upon the first trial and remanding the case to the District Court.

3. The Defendant's Bill of Exceptions, including the evidence reduced to narrative form.

4. The exhibits filed with the testimony of Wilson R. Payne, consisting of the conditional sales contracts covering the four automobiles claimed by the plaintiff, marked Exhibit "B" and Exhibit "C", omitting the blank assignments thereto attached.

5. The Assignment of Errors, and this stipulation of counsel.

It is further stipulated and agreed that the original papers to be certified by the Clerk of this Court to the United States Circuit Court of Appeals at Richmond, accompanying and as a part of the transcript of record herein are as follows:

(a) Petition for Writ of Error.
(b) Order Granting Writ of Error.
(c) Writ of Error.
(d) Citation with service accepted.

[fols. 57 & 58] IN UNITED STATES DISTRICT COURT

STIPULATION RE TRANSCRIPT OF RECORD—Filed February 20th, 1926

It is further stipulated and agreed that the Clerk of this Court shall make up a transcript of the record in this cause and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, who shall have the same printed in accordance with Rule 23.

(Signed) S. M. Brandt, Counsel for Plaintiff in Error. Jos. M. Hurt, Jr., Counsel for Defendant in Error.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 59] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 2506

FINANCE AND GUARANTY COMPANY, Plaintiff in Error,

versus

HENRY W. OPPENHIMER, Trustee in Bankruptcy for W. A. Lee, Trading as National Motor Company, Bankrupt, Defendant in Error

Error to the District Court of the United States for the Eastern District of Virginia, at Richmond

MINUTE ENTRIES

March 29, 1926, the transcript of record is filed and the case docketed.

Same day, the original petition for writ of error, order allowing writ of error, writ of error, writ of error bond, and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of S. M. Brandt is entered for the plaintiff in error.

April 1, 1926, the appearance of Joseph M. Hurt, Jr., is entered for the defendant in error.

April 16, 1926, twenty-five copies of the printed record are filed.

April 27, 1926, petition of defendant in error to continue case to the October term, 1926, is filed.

April 27, 1926 (April term, 1926), cause is continued in open Court, to the October term, 1926.

[fol. 60] In United States Circuit Court of Appeals

Argument and Submission

October 21, 1926 (October term, 1926), cause came on to be heard before Waddill, Rose and Parker, Circuit Judges, and is argued by counsel and submitted.

In United States Circuit Court of Appeals, Fourth Circuit

No. 2506

[Title omitted]

In Bankruptcy

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond

(Argued October 21, 1926. Decided October 30, 1926)

Before Waddill, Rose, and Parker, Circuit Judges

S. M. Brandt for Plaintiff in Error and Joseph M. Hurt, Jr., for defendant in error.

Opinion—Filed October 30, 1926

[fol. 61] Per Curiam:

This case has been before us twice. What we had to say about it at its first presentation will be found in 5 F. (2d)

486. When in pursuance to our mandate, it was again tried below a jury trial was waived in writing. The learned District Judge was thus made the trier of the facts and he found that the value of the property converted by the appellant was $4,190.99. There was sufficient evidence to support this conclusion and its accuracy is not reviewable here.

On the fundamental question as to the relative rights of the trustee and the appellant the case made at the second trial did not differ from the one upon which we had already passed. None of the exceptional circumstances which sometimes justify a departure from the rule of the law of the case are found here.

Affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

[Title omitted]

JUDGMENT—Filed November 1, 1926

[fol. 62] This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs.

November 1, 1926.

John C. Rose, U. S. Circuit Judge.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—Filed November 30, 1926

Upon the application of the plaintiff in error, by S. M. Brandt, Esq., its attorney, and for good cause shown,

It is ordered, that the mandate of this Court in the above case be, and the same is hereby, stayed pending the appli-

cation of the plaintiff in error in the Supreme Court of the United States for a writ of certiorari to this Court, provided said application is presented in the said Supreme Court within 45 days from this date.

Edmund Waddill, Jr., Senior Circuit Judge.

November 30, 1926.

[fol. 63] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 64] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 7, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. [redacted]170

FIDELITY AND GUARANTY COMPANY,

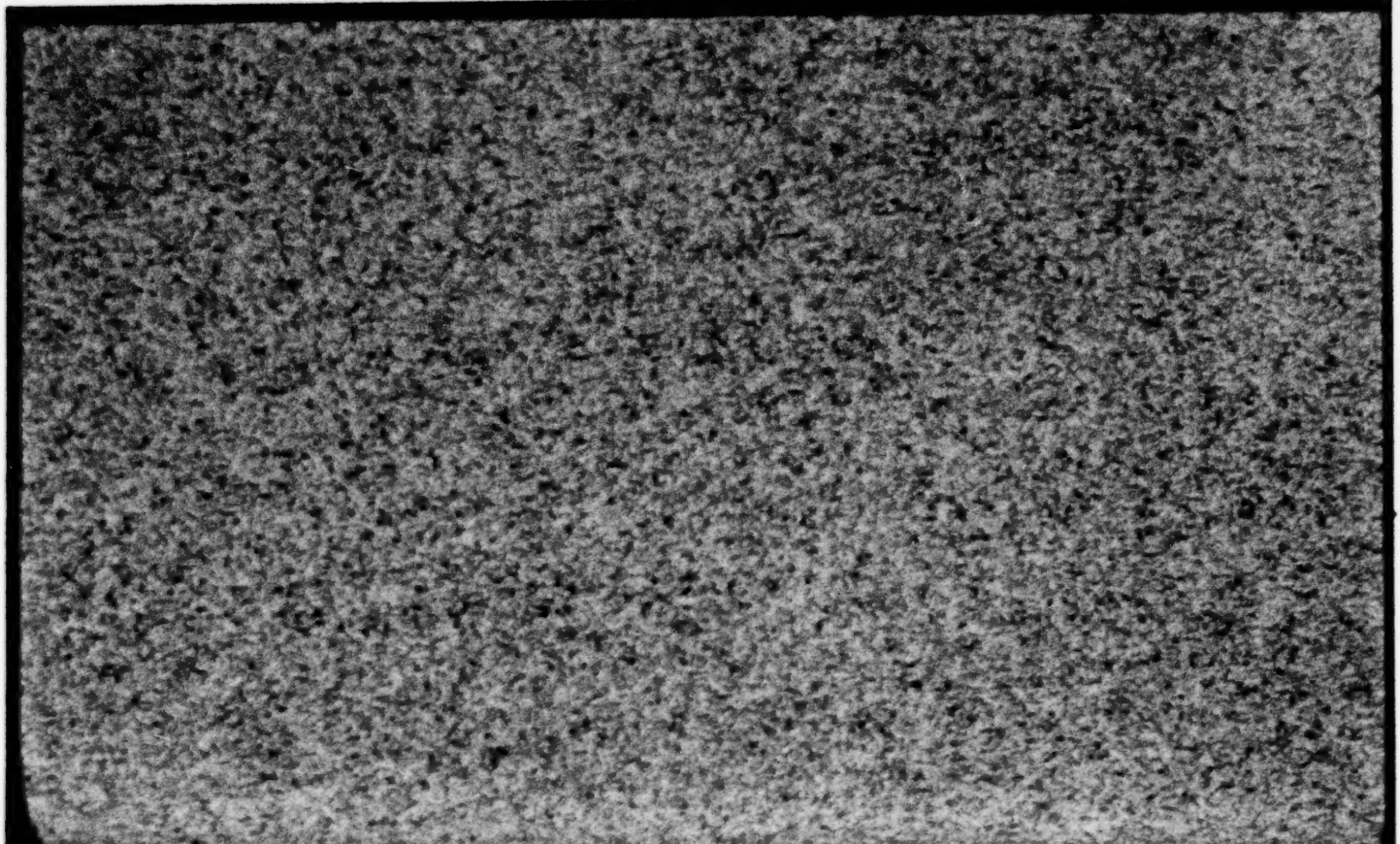
Petitioner,

vs.

HENRY W. OPPENHEIMER, Trustee in Bankruptcy of [redacted] W. A. Ide, Trustee in Bankruptcy of National Mining Corporation, Bankrupt, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

E. M. FRAZIER,
Counsel for Petitioner.



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No.

FINANCE AND GUARANTY COMPANY,
PETITIONER,

vs.

HENRY W. OPPENHIMER, TRUSTEE IN BANKRUPTCY FOR W. A. LEE, TRADING AS NATIONAL MOTOR COMPANY, BANKRUPT, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The petition of Finance and Guaranty Company, a corporation duly organized and existing under the laws of the State of Delaware, petitioner, respectfully represents:

This action was brought in the District Court of the United States for the Eastern District of Virginia, at Richmond, Va., by the respondent, Henry W. Oppenhimer, trustee in bankruptcy for W. A. Lee, trading as National Motor Company, bankrupt, against the petitioner, Finance and Guaranty Company, for the recovery of four certain automobiles of which the petitioner had repossessed itself under the terms of certain conditional sales contracts by the institution of an action at law in the State court on the 10th day of January, 1922, on the ground that such repossession of said automobiles by the petitioner constituted a voidable preference as against said trustee in bankruptcy because such automobiles, under the provisions of Section 5224 of the Code of Virginia, known as the "Traders' Act," were made liable for the debts of the bankrupt.

Upon a trial had in the district court, a jury having been waived under proper stipulations of counsel, the district court held that the trustee in bankruptcy was not entitled to recover under the said "Traders' Act" (Rec., p. 13), to which judgment of the district court a writ of error was sued out by the trustee in bankruptcy to the Circuit Court of Appeals for the Fourth Circuit, the said circuit court of appeals reversing the judgment of the district court and holding that the trustee in bankruptcy, by reason of the "Traders' Act," was entitled to recover of the petitioner the said automobiles (Rec., p. 22; see 5 Fed., 2d, p. 486). The said circuit court of appeals then remanded the case to the district court for a new trial and the district court, on the

14th day of January, 1926, feeling itself bound by the opinion and judgment of the Circuit Court of Appeals for the Fourth Circuit, entered judgment against the petitioner for the sum of $4,190.99, with interest thereon from December 15, 1922, until paid (Rec., p. 37), being the value fixed by the court of the four automobiles which are the subject of this action, to which judgment of the court upon said second trial of this action the petitioner sued out a writ of error to the United States Circuit Court of Appeals for the Fourth Circuit, which said circuit court of appeals did, by its judgment entered on the 1st day of November, 1926, affirm the judgment of the district court and adhered to its former decision on the ground that it was bound by its former ruling, being the "law of the case" (Rec., p. 61), all of which is made more fully to appear by a certified transcript of the record in the said Circuit Court of Appeals for the Fourth Circuit which is hereto attached and prayed to be taken and read as a part of this petition.

To clarify the grounds upon which this petition for a writ of certiorari is based, a condensed statement of facts is respectfully submitted:

The petitioner was the holder of duly recorded conditional sales contracts covering four automobiles which were delivered to the possession of W. A. Lee, a resident of the city of Richmond, Va., who was doing business therein. On the 10th day of January, 1922, by an action in a State court of competent jurisdiction, the petitioner repossessed itself of said automobiles and was in possession thereof for ten days prior to

the filing of the petition in bankruptcy, in which bankruptcy proceedings the respondent was appointed trustee of the estate of the bankrupt. As far as the record discloses, at the time of the repossession of said automobiles by the petitioner there were no existing liens against the property in the possession of Lee.

The United States Circuit Court of Appeals for the Fourth Circuit held that the trustee in bankruptcy, whose status is fixed as a lienor under Section 47 A of the Bankrupt Act of 1910, was entitled to recover of the petitioner the automobiles so repossessed by it, such repossession by it constituting a voidable preference, because by the provisions of Section 5224 of the Code of Virginia, commonly called the "Traders' Act," the said automobiles were liable for the debts of Lee, the bankrupt.

The provisions of Section 5224 of the Code of Virginia, commonly called the "Traders' Act," are as follows:

> "If factor, agent, etc., who is a trader, fail to disclose name of principal or partner, or do business in his own name, property used in such business liable for his debts; exception. If any person transact business as a trader, with the addition of the words 'factor,' 'agent,' 'and company,' or 'and Co.,' and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house wherein such business is transacted, and also by a notice published for two weeks in a newspaper (if any) printed in the city, town or county wherein the same is transacted; or if any person transact such business in his own name,

> without any such addition; all the property, stock, and choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for the debts of such person. This section shall not apply to a person transacting such business under a license to him as an auctioneer or commission merchant."

The petitioner most respectfully represents that the United States Circuit Court of Appeals for the Fourth Circuit failed—

1st. To follow or to give force or effect to the rulings and decisions of this Honorable Court upon the legal propositions involved; and

2d. To give force and effect to the rulings and decisions of the Supreme Court of Appeals of Virginia, that being the highest court of the State of Virginia, construing Section 5224 of the Code of Virginia, commonly called the "Traders' Act."

It has been recently held in the case of Capitol Motor Company vs. Lasker, 136 Va., 630, reaffirming the rulings and decisions theretofore had, that "creditors," within the purview of the "Traders' Act," means "lien creditors"—that is, persons who have liens upon the property.

Under the decision of this Honorable Court in the case of Bailey vs. Baker Ice Machine Co., 239 U. S., 268, 276; 36 Sup. Ct., 50; 60 L. Ed., 275, the status, as a lienor, of a trustee in bankruptcy under Section 47-A of the Bankrupt Act of 1910 is fixed as of the date of the filing of the petition in bankruptcy.

It is, therefore, at once apparent that the rights of the trustee in bankruptcy, being fixed as a lienor as of the date of the filing of the petition in bankruptcy, cannot relate back prior to the time of the filing of the petition so as to permit unsecured or non lien creditors to defeat the rights of a conditional sales vendor whose lien had been perfected as required by law long prior to the bankruptcy proceeding, and that the Honorable Circuit Court of Appeals for the Fourth Circuit failed to follow the decision of this Honorable Court, binding upon it in this behalf.

3d. The ruling and judgment of the Circuit Court of Appeals for the Fourth Circuit, being the law of the fourth circuit, creates a conflict of decision in the several circuits of the United States in the construction of Section 47-A of the Bankrupt Act of 1910, since, if the ruling of the Circuit Court of Appeals for the Fourth Circuit is permitted to stand the rule of this Honorable Court in the case of Bailey *vs.* Baker Ice Machine Co., *supra*, would not apply in the fourth circuit, whereas it does apply to the several other circuits of the United States.

The legal propositions involved in this petition are of great importance to the general public and the parties.

The petitioner respectfully presents herewith, as part of this petition, a certified transcript of the record in the said circuit court of appeals, and further presents herewith a brief in support of its petition which deals more fully with the questions involved herein.

The petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said circuit court of appeals in this case, to the end that said case may be reviewed and determined by this Court as provided by law, and that your petitioner may have such and further relief or remedy in the premises as to this Court may seem appropriate, and that the said judgment of the said circuit court of appeals may be reversed by this Honorable Court.

FINANCE AND GUARANTY COMPANY,
By S. M. BRANDT,
Its Attorney.

UNITED STATES OF AMERICA,
State of Virginia,
City of Norfolk, To wit:

S. M. Brandt, being duly sworn, says that he is counsel for Finance and Guaranty Company, the petitioner; that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

S. M. BRANDT.

Subscribed and sworn to before me this 3d day of January, A. D. 1927.

My commission expires August 3, 1929.

[SEAL.] SELMA MORRIS,
Notary Public for the City of Norfolk, Virginia.

Certificate of Counsel.

I, S. M. Brandt, of the city of Norfolk, State of Virginia, an attorney regularly admitted to the practice in the Supreme Court of the United States of America and the attorney for the petitioner herein, do hereby certify that in my opinion the foregoing petition is well founded in matters of law; that in my opinion the case is one in which the prayer of the petitioner should be granted by this Court.

Dated Norfolk, Va., January 3, 1927.

S. M. BRANDT.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

FINANCE AND GUARANTY COMPANY,
PETITIONER,

vs.

HENRY W. OPPENHIMER, TRUSTEE IN BANKRUPTCY FOR W. A. LEE, TRADING AS NATIONAL MOTOR COMPANY, BANKRUPT, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Statement.

Three grounds of error on the part of the Honorable Circuit Court of Appeals for the Fourth Circuit are respectfully submitted as ground for the allowance of a writ of certiorari.

1. That said circuit court of appeals failed to give force and effect to the ruling of the Supreme Court of the United States in Bailey *vs.* Baker Ice Machine Com-

pany, 239 U. S., 268, in which the rule is laid down that the status, as a lienor, of a trustee in bankruptcy, under Section 47 A of the Bankrupt Act of 1910, is fixed as of the date of the filing of the petition in bankruptcy, the circuit court of appeals having held that by reason of the application of the Virginia statute—Section 5224 of the Code of Virginia, known as the "Traders' Act"—that the rights of the trustee in bankruptcy were fixed at a time anterior to the filing of the petition in bankruptcy, in that the property which is the subject of this litigation, having been in the possession of the bankrupt without compliance by the bankrupt with the terms of said "Traders' Act," that said property was liable for the debts of the bankrupt, though its status was changed by the repossession thereof by your petitioner ten days prior to the filing of the bankruptcy petition.

2. That the said circuit court of appeals failed to give force and effect to the decisions of the Supreme Court of Appeals of Virginia construing said "Traders' Act," the latter court being the highest court of the State of Virginia.

The rule in Virginia, as laid down in Capitol Motor Company vs. Lasker, 138 Va., 630, reaffirming a long line of decisions construing said act, is that the word "creditors," as employed in said act, means "lien creditors"—that is, persons who have liens upon the property. Had the honorable circuit court of appeals applied the same construction to the statute, Section 5224 of the Code of Virginia, known as the "Traders'

Act," as the Supreme Court of Appeals of Virginia, based upon the facts as disclosed by the record, then the rights of your petitioner would have been protected and its property would have been restored to or rather retained by it.

3. The ruling and judgment of the Circuit Court of Appeals for the Fourth Circuit of necessity fixes the rights of the trustee in bankruptcy as a lienor, NOT AS OF THE TIME OF THE FILING OF THE BANKRUPTCY PETITION, but as of the time when the property was held by the bankrupt under conditions making it subject to the Virginia Traders' Act, though its status was changed prior to the filing of the petition in bankruptcy so as to make it not subject to Virginia Traders' Act, is in effect a ruling that the rights of the trustee in bankruptcy are fixed as of a time anterior to the filing of a petition in bankruptcy, and therefore fails to follow the rule laid down by the Supreme Court of the United States in Bailey *vs.* Baker Ice Machine Company, *supra*, and creates a conflict of decision in the several circuits of the United States, construing Section 47-A of the Bankrupt Act of 1910, if permitted to stand.

Facts.

In order to clarify the petitioner's position brief reference is respectfully made to the facts as disclosed by the record:

On the 28th day of April, 1921, and on the 6th day of August, 1921, respectively, the petitioner contracted by

conditional sales agreement to sell to the National Motor Company (W. A. Lee, trading under this name) four certain Velie automobiles, described in said contracts, which said contracts were duly docketed, in accordance with the statute in such case made and provided, on the 18th day of May, 1921, and on September 10, 1921, respectively, in the office of the clerk of the Chancery Court of the City of Richmond, this docketing being in strict accordance with the statute in such case made and provided. The contracts in all other respects conform to the provisions of the statute, title to the automobiles which are the subject thereof being reserved in the petitioner until said automobiles were fully paid for as provided by said contracts; nothing was paid upon the contract price of this property, and on the 10th day of January, 1922, in a suit instituted in the Court of Law and Equity of the City of Richmond for the recovery of these automobiles an order of seizure was issued and the property seized and delivered to the possession of the petitioner; that from the 26th day of December, 1921, until the 10th day of January, 1922, a period of 15 days, the place wherein the business of Lee, trading as the National Motor Company, was conducted was closed, and during said period he had ceased to conduct business. On the 20th day of January, 1922, a petition in involuntary bankruptcy was filed against Lee and he was finally adjudicated a bankrupt upon an order of publication entered in said proceeding because no service of process could be had upon Lee. On January 4, 1923, a year after the seizure of said automobiles and return thereof

to the petitioner, said seizure being had pursuant to the conditional sales contracts reserving title in the petitioner, this action was instituted by the trustee in bankruptcy against this petitioner to recover possession of said automobiles. The title to this property was at all times in the defendant, and no property in said automobiles was ever acquired by the bankrupt. The conditional sales contracts prohibited either the sale or use of these automobiles by Lee; the petitioner was constantly vigilant that the terms of the contract should be complied with. From the very day of the delivery of these automobiles to the possession of Lee under said conditional sales contracts the petitioner was constantly alert to see that they did not leave Lee's possession, having time and again visited Lee's store room for the purpose of "checking" these cars.

Legal Propositions Involved.

The Circuit Court of Appeals for the Fourth Circuit, in its opinion rendered on the 1st day of November, 1926 (Rec., p. 23), makes the rights of the trustee "depend upon the so called 'Trader's Act' of Virginia—Section 5224 of the Code of Virginia"—and proceeds on the theory that the Virginia decisions hold that where goods or property of another are put into the possession of a trader, so as to form a part of his ordinary stock of merchandise, they become liable for his debts; that having once been in the possession of the trader they remain liable for such debts though repossessed by the true owner thereof, if such reposses-

sion is had within four months prior to the filing of a bankruptcy petition against the trader then such repossession constitutes a voidable preference as against a trustee in bankruptcy. The court further holds that a trustee under a deed of assignment is not, under the law of Virginia, a lienor in the same sense and with powers of a trustee in bankruptcy.

The Supreme Court of Appeals of Virginia, in Capitol Motor Company *vs.* Lasker, 138 Va., p. 630, reaffirming a long line of decisions, held:

a. That under the Virginia law a trustee under a deed of assignment, upon the recordation of the deed, becomes a lienor.

b. That the word "creditors" as employed in the Virginia Traders' Act (Virginia Code, Section 5224) means "Lien Creditors."

c. That property in the possession of a trader as a part of his general stock of merchandise, while so possessed, is subject to the provisions of the "Traders' Act," but when repossessed by the true owner thereof before any lien has attached thereto is no longer subject to the provisions of said "Traders' Act."

That such is the true construction of said Section 5224 of the Code of Virginia—"Traders' Act"—is amply supported by the language of the Supreme Court of Appeals of Virginia in the case of Capitol Motor Company *vs.* Lasker, *supra*, cited by the Circuit Court of Appeals for the Fourth Circuit in support of its ruling, to which language we most respectfully direct the attention of the Court.

At page 637 of volume 138, Virginia Reporter, it is said:

> "The main questions involved may be stated thus: (1) Were the eight automobiles or any of them, liable to the creditors of the defendant under Section 5224 of the Code, known as the Traders' Act; and (2) did White, the assignee, have the right to recover the eight automobiles, or any of them, for the benefit of the creditors of the defendant?
>
> "So much of Section 5224, Code of 1919, as is applicable, is as follows: 'If any person transact such business in his own name * * * all the property, stock and choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for the debts of such persons.'
>
> "It is earnestly contended by counsel for the defendant that in construing this statute the question of the true ownership of the property is not involved, that the only question for determination is whether the stock or property was acquired or used in such business. Citing Hoge *vs.* Turner, 96 Va., 624. That the lien which the plaintiff seeks to assert is a secret lien and is in fraud of the rights of the general creditors.
>
> "Judge Riely, in delivering the opinion of the court in Hoge *vs.* Turner, *supra*, said: 'The purpose of the legislature in enacting the statute, as the title of the original act passed March 28, 1839, shows, was to prevent persons carrying on business under false or fictitious names and firms. To prevent fraud,' etc.
>
> "Numerous cases have been cited dealing with this statute. Edmunds *vs.* Hoffie Piano

Co., 97 Va., 588; Partlow *vs.* Lickliter, 100 Va., 63; Virginia Book Co., Inc., *vs.* Site, 254 Fed., 46; Boice *vs.* Finance and Guaranty Corporation, 127 Va., 563.

"In all of these cases the question presented was either a contest between the trader and creditors, between judgment creditors and lienor, or between an innocent purchaser for value and lienor or seller. The instant case is different. Here there is no contention that the dealer is trying to perpetrate a fraud on its creditors. On the contrary, the dealer, or to be more exact, its assignee, is extremely virtuous and is seeking to prevent one of its creditors from perpetrating a fraud upon all of its other creditors. If the act of the plaintiff is fraudulent, it was rendered so by the acquiescence of the defendant. We do not think the action of the plaintiff was in any respect fraudulent. It had a right to enter into the transaction, taking as it did the risk of having the automobiles subjected to the debts of defendant before it could enforce its trust lien. So as between plaintiff and defendant the recordation of the trust agreement was an immaterial matter. But as between plaintiff and the other creditors of defendant a different situation is presented.

"Until the institution of the action of detinue and the execution and recordation of the deed of assignment, we have no difficulty in holding that the eight automobiles constituted in part the apparent assets of the defendant dealer, and could be subjected to satisfy the claims of creditors, that is, lien creditors.

"(1) In answering question number one, we are of the opinion that a proper construction

of the 'Traders' Act' (Sec. 5224) is that the act is applicable only to property, stocks, etc., used in the business of the trader, *i. e.*, property, stocks, etc., which constitutes, in whole or in part, the apparent assets of the business of the trader, at the time in question; and that the creditors who are entitled to claim the benefit of such act are lien creditors only, or some representative of theirs, such as their trustee, and that whether the lien be obtained by deed of trust, execution, or otherwise, is immaterial.

"(2) In answering question number two, we are further of the opinion that White, trustee, was the proper one to intervene in the detinue action; that as trustee under the deed of assignment, he was the representative of the creditors of defendant, who immediately upon the recordation of the deed of assignment became lien creditors."

And again, at page 641:

"Upon applying the construction of the Traders' Act as stated, *supra*, to the instant case, we find the following to be the situation:

"On November 4, 1921, plaintiff by its action of detinue instituted, and its bond given that day, and the possession taken that day by the sheriff under the bond, repossessed itself of six of the automobiles on that day; so that after November 4th, those six automobiles were no longer a part of the apparent assets of the business of the trader, the defendant. That is to say, after that date the Traders' Act was no longer applicable to those six automobiles.

> "The deed of trust to White, trustee, executed on November 7, could not and did not convey any rights under the Traders' Act to White, trustee, or to any creditors, as to the six automobiles. But as to the other two automobiles, plaintiff did not obtain possession of them until November 10, 1921. They, until that date, continued to be part of the apparent assets of said trader, the defendant. They, therefore, as property to which the Traders' Act was applicable, passed to the trustee, by virtue of the deed of trust executed on November 7, 1921, which gave to the creditors, secured in that deed, or the trustee as assignee for their benefit, the right to claim the benefit of the act as to the two automobiles and to recover the same."

The property, which is the subject of this litigation, was repossessed by the true owner ten days prior to the filing of the bankruptcy petition.

Under the Virginia decisions, upon such repossession it ceased to be subject to the provisions of the Traders' Act.

Ten days prior to the filing of the bankruptcy petition said property ceased to be any part of the apparent assets of the then trader and subsequent bankrupt.

Under the authority of Bailey vs. Baker Ice Machine Company, *supra*, the trustee in bankruptcy's status as a lienor became fixed ten days after the Virginia Traders' Act ceased to be applicable to the property of the petitioner.

It therefore follows that the rights of your petitioner were fixed on the 10th day of January, 1922, when it repossessed its property, and that the rights of the trustee in bankruptcy were fixed on the 20th day of January, 1922, when the petition was filed.

We respectfully submit that the ruling of this Honorable Court in Bailey *vs.* Ice Machine Company, *supra*, is conclusive of the legal propositions here involved, and that the Circuit Court of Appeals for the Fourth Circuit, having failed to follow said ruling, that its decision and judgment is erroneous and if permitted to stand would work great injustice to your petitioner and all persons similarly situated.

It is most respectfully submitted that under a proper construction of the Virginia Traders' Act said act could have no application to the property repossessed by your petitioner ten days prior to the filing of the bankruptcy petition, and that the rights of the trustee in bankruptcy as a lienor, being fixed as of the time of the filing of the bankruptcy petition, that he had no claim upon or lien against said property, and that the Circuit Court of Appeals for the Fourth Circuit erred in so holding.

The rights of the trustee in bankruptcy being fixed by the provisions of 47 A of the Bankruptcy Act, as construed by this Honorable Court in Bailey *vs.* Baker, etc., *supra*, that the said Circuit Court of Appeals for the Fourth Circuit were bound by such ruling and when applied to the facts of this case should have held that the property which is the subject of this litigation was not subject to any claim by the trustee.

That the repossession by your petitioner of its property ten days prior to the filing of the bankruptcy petition did not constitute a voidable preference as against the trustee in bankruptcy within the meaning of Section 60-B of the Bankrupt Act is clear under the authority of Bailey *vs.* Baker, etc., *supra*, in which this Court said:

> "The question next to be considered is whether the contract operated as a preferential transfer by Grant Brothers within the meaning of Section *60b* of the Bankruptcy Act, as amended June 25, 1910, Chap. 412; 36 Stat. at L., 838, 842; Comp. Stat., 1913, Sections 9586, 9644, which declares that 'a transfer' by a bankrupt 'of any of his property' shall be voidable by the trustee, if it be made or recorded (when recording is required) within four months before the petition in bankruptcy is filed, and 'the bankrupt be insolvent and the * * * transfer then operate as a preference,' etc. The section leaves no doubt that to be within its terms the transfer must be one which a bankrupt makes of his own property and which operates to prefer one creditor over others; and if further light be needed there is a declaration in the Bankruptcy Act (Section 1, clause 25) that the word 'Transfer' shall be taken to include every mode 'of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security' (30 Stat. at L., 545; Chap. 541, Comp. Stat., 1913, Section 9585). It, therefore, is plain that Section *60b* refers to an act on the part of a bankrupt

whereby he surrenders or encumbers his property or some part of it for the benefit of a particular creditor, and thereby diminishes the estate which the Bankruptcy Act seeks to apply for the benefit of all creditors. New York County Nat. Bank *vs.* Massey, 192 U. S., 138, 147; 48 L. Ed., 380, 384, 24 Sup. Ct. Rept., 199. Applying this test to the contract in question, we think it did not operate as a preferential transfer by Grant Brothers, the bankrupts. The property to which it related was not theirs, but the Baker Company's. The ownership was not transferred, but only the possession, and it was transferred to the bankrupts, not from them. Being only conditional purchasers, they were not to become the owners until the condition was performed. No doubt the right to perform it and thereby to acquire the ownership was a property right. But this right was not surrendered or encumbered. On the contrary, it remained with the bankrupts and ultimately passed to the trustee, who was free to exercise it for the benefit of the creditors. So, there was no diminution of the bankrupts' estate.

"Under the recording law of Kansas a contract of conditional sale is valid between the parties, whether filed for record or not, but is void as against a creditor of the vendee who fastens a lien upon the property by execution, attachment, or like legal process before the contract is filed for record. Gen. Stat., 1909, Sec. 5237; McVay *vs.* English, 30 Kans., 368, 371; 1 Pac., 795; American Lead Pencil Co. *vs.* Champion, 57 Kans., 352, 357; 46 Pac., 969; Youngberry *vs.* Walsh, 72 Kans., 200, 227; 83

Pac., 972; Geyser M. F. G. Co. *vs.* Murray, 84 Kan., 450, L. R. A.; 114 Pac., 1046; Paul *vs.* Lingenfelter, 69 Kan., 871; 132 Pac., 1179; Geppelt *vs.* Middlewest Stone Co., 90 Kan., 539; 135 Pac., 573; Dixon *vs.* Tyrer, 92 Kan., 137; 139 Pac., 1026; Big Four Implement Co. *vs.* Wright, 47 L. R. A. (N. S.), 1223; 125 C. C. A., 577; 207 Fed., 535. Here the contract was made October 14th, 1911, and filed for record May 15, 1912. In the meantime no creditor fastened a lien upon the property by execution, attachment, or other legal process. But it is contended that Section 47 A, clause 2, of the Bankruptcy Act, as amended in 1910, chap. 412, 36 St. at L., 838; 8U Comp. Stat., 1913, sections 9586, 9631, gave the trustee the status of a creditor having such a lien. That section provides that a trustee in bankruptcy, 'as to all property in the custody or coming into the custody of the bankrupt court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings.' Although otherwise explicit, this provision does not designate the time as of which the trustee is to be regarded as having acquired the status indicated, and yet some point of time must be intended. Is it the date of the trustee's appointment, the filing of the petition in bankruptcy, or some time anterior to both? When not otherwise specially provided, the rights, remedies, and powers of the trustee are determined with reference to the conditions existing when the petition is filed. It is then that the bankruptcy proceeding is initiated, that the hands of the bankrupt and of his creditors are stayed, and that his

estate passes actually or potentially into the control of the bankruptcy court. We have said, 'the filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as in *custodia legis* from the filing of the petition.' Acme Harvester Co. *vs.* Beeckman Lumber Co., 222 U. S., 300, 307; 56 L. Ed., 208, 213; 32 Sup. Ct. Rep., 96. And again: 'We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed, and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition.' Everett *vs.* Judson, 228 U. S., 474, 479; 57 L. Ed., 927, 929; 46 L. R. A. (N. S.), 154, 33 Sup. Ct. Rep., 568. And see Zavelo *vs.* Reeves, 227 U. S., 625, 631; 57 L. Ed., 676, 678; 33 Sup. Ct. Rep., 365; Ann. Cas., 1914 D, 664. Had it been intended that the trustee should take the status of a creditor holding a lien by legal or equitable process as of a time anterior to the initiation of the bankruptcy proceeding, it seems reasonable to believe that some expression of that intention would have been embodied in Section 47-A, as amended. As this was not done, we think the latter view, and one which accords with other provisions of the act, is that the trustee takes the status of such a creditor as of the time when the petition in bankruptcy is filed. Here the petition was filed almost two months after

the contract was filed for record, and therefore the trustee was not entitled to assail it under the recording law of the State."

Conclusion.

We respectfully submit that had the Circuit Court of Appeals for the Fourth Circuit followed the rule of decision in Virginia in construing the so-called "Traders' Act" and the ruling of this Honorable Court in Bailey *vs.* Baker Ice Machine Co., *supra*, that judgment would have been pronounced in favor of your petitioner.

Your petitioner further respectfully submits that, for the reasons assigned and that because if said decision of said Circuit Court of Appeals for the Fourth Circuit is permitted to stand that there will be a conflict of the construction of Section 47-A of the Bankrupt Act among the several circuits of the United States, a writ of certiorari to review the judgment of the said circuit court of appeals should be granted.

Respectfully submitted,

S. M. BRANDT,
Attorney for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 170.

FINANCE AND GUARANTY COMPANY,
PETITIONER,

vs.

HENRY W. OPPENHIMER, TRUSTEE IN BANKRUPTCY FOR W. A. LEE, TRADING AS NATIONAL MOTOR COMPANY, BANKRUPT.

BRIEF FOR PETITIONER.

The opinion of the court below and the judgment to which this writ was granted is styled Oppenhimer, Trustee, *vs.* Finance and Guaranty Company, 5 Fed. (2d), p. 486, and 15 Fed. (2d), p. 1011.

Grounds of Jurisdiction.

The Circuit Court of Appeals for the Fourth Circuit, by its judgments rendered herein on the 5th day

of May, 1925 (R., 16-20), and November 1, 1926 (R., 51-52), respectively, held:

1. That under Section 5224 of the Code of Virginia, called the "Traders' Act," which is hereinafter set forth, that the rights of a trustee in bankruptcy, as a lienor under Section 47-A of the Bankrupt Act as amended by the Act of 1910, related back to a time anterior to the filing of the bankruptcy petition—that is, that under said "Traders' Act" property claimed to be subject to the provisions of the said "Traders' Act" remained subject to its provisions, even though its status was changed by the recapture thereof by the true owner thereof when it was subject to no lien and prior to the intervention of bankruptcy proceedings.

By such ruling the Circuit Court of Appeals for the Fourth Circuit failed to follow the ruling of the Supreme Court of the United States in Bailey *vs.* Baker Ice Machine Co., 239 U. S., 268, 276, which lays down the rule that the rights of a trustee in bankruptcy, as a lienor under the amendment of 1910 of the Bankrupt Act, attaches as of the time of the filing of the petition in bankruptcy.

It, therefore, follows that the construction by the Circuit Court of Appeals for the Fourth Circuit of Section 47-A of the Bankrupt Act is directly opposed to the construction of said Section 47-A by this Honorable Court and in conflict with the uniform construction of said Section 47-A of the Bankrupt Act, following the decision of this Court in Bailey *vs.* Baker Ice Machine Co., *supra*, of the several other circuits in the United States.

2. Notwithstanding the construction of the "Traders' Act," aforesaid, by the Supreme Court of Appeals of Virginia, that being the highest court in the State of Virginia, that said act enured to the benefit of "lien creditors" only (Capitol Motor Co. *vs.* Lasker, 138 Va., 630), the said Circuit Court of Appeals for the Fourth Circuit held that under the said "Traders' Act" the trustee in bankruptcy was entitled to recover the property which is the subject of this litigation, though, at the time of the filing of the petition in bankruptcy, said property had been recaptured by the true owner and was not subject to any lien by execution or other legal process.

The Circuit Court of Appeals for the Fourth Circuit, having refused to adopt the construction of the Virginia "Traders' Act" by the Supreme Court of Appeals of Virginia, that being the highest court in said State, the Federal Court, sitting in Virginia, has failed to enforce the law of Virginia as applied to the rights of your petitioner.

By reason of said construction of Section 47-A of the Bankrupt Act by said Circuit Court of Appeals for the Fourth Circuit and the failure of said circuit court of appeals to follow the construction of the Virginia "Traders' Act" by the Supreme Court of Appeals of Virginia, as aforesaid, it is proper that this Honorable Court should review said judgment of the Circuit Court of Appeals for the Fourth Circuit pursuant to Act of February 13, 1925, C. 229, Secs. 1, 13; 43 Stat., 936, 941; Title 11, Sec. 48, U. S. C. A. See Forsyth *vs.* Hammond, 166 U. S., 506, 514; Am. Const. R. Co. *vs.* Jacksonville, etc., Ry. Co., 148 U. S., 384.

Statement.

This action was brought in the District Court of the United States for the Eastern District of Virginia, at Richmond, Virginia, by the respondent, Henry W. Oppenheimer, trustee in bankruptcy for W. A. Lee, trading as National Motor Company, bankrupt, against the petitioner, Finance and Guaranty Company, for the recovery of four certain automobiles, of which the petitioner has repossessed itself under the terms of certain conditional sales contracts by the institution of an action at law in the State court on the 19th day of January, 1922, on the ground that such repossession of said automobiles by the petitioner constituted a voidable preference as against said trustee in bankruptcy because such automobiles, under the provisions of Section 5224 of the Code of Virginia, known as the "Traders' Act," were made liable for the debts of the bankrupt (R., 1-4).

Upon a trial had in the district court, a jury having been waived under proper stipulations of counsel, the district court held that the trustee in bankruptcy was not entitled to recover under the said "Traders' Act" (R., 10), to which judgment of the district court a writ of error was sued out by the trustee in bankruptcy to the Circuit Court of Appeals for the Fourth Circuit, the said circuit court of appeals reversing the judgment of the district court and holding that the trustee in bankruptcy, by reason of the "Traders' Act," was entitled to recover of the petitioner the said automobiles (R., 17-20; see 3 Fed. (2d), p. 486). The said

circuit court of appeals then remanded the case to the district court for a new trial, and the district court (R., 21-22), on the 15th day of January, 1926, feeling itself bound by the opinion and judgment of the Circuit Court of Appeals for the Fourth Circuit, entered judgment against the petitioner for the sum of $4,120.39, with interest thereon from December 15, 1922, until paid (R., 22-23), being the value fixed by the court of the four automobiles which are the subject of this action, to which judgment of the court upon said second trial of this action the petitioner sued out a writ of error to the United States Circuit Court of Appeals for the Fourth Circuit, which said circuit court of appeals did, by its judgment entered on the 1st day of November, 1926, affirm the judgment of the district court and adhered to its former decision on the ground that it was bound by its former ruling, being the "law of the case" (R., pp. 51-52).

Facts.

On the 28th day of April, 1921 (R., 34), and on the 6th day of August, 1921 (R., 40), respectively, the petitioner contracted by conditional sales agreement to sell to the National Motor Company (W. A. Lee trading under this name) four certain Velie automobiles, described in said contract, which said contracts were duly docketed, in accordance with the statute in such case made and provided, on the 18th day of May, 1921, and on September 10, 1921, respectively, in the office of the clerk of the Chancery Court of the City

of Richmond, this docketing being in strict accordance with the statute in such case made and provided. The contracts in all other respects conform to the provisions of the statute, title to the automobiles, which are the subject thereof, being reserved in the petitioner until said automobiles were fully paid for, as provided by said contracts; nothing was paid upon the contract price of this property, and on the 10th day of January, 1922, in a suit instituted in the Court of Law and Equity of the City of Richmond for the recovery of these automobiles, an order of seizure was issued and the property seized and delivered to the possession of the petitioner (R., 37); that from the 26th day of December, 1921, until the 10th day of January, 1922, a period of 15 days, the place wherein the business of Lee, trading as the National Motor Company, was conducted was closed, and during said period he had ceased to conduct business (R., 24). On the 20th day of January, 1922, a petition in involuntary bankruptcy was filed against Lee (R., 24), and he was finally adjudicated a bankrupt upon an order of publication entered in said proceeding because no service of process could be had upon Lee. On March 22, 1922, Henry W. Oppenhimer was appointed trustee in bankruptcy of W. A. Lee (R., 24). On January 4, 1923, a year after the seizure of said automobiles and return thereof to the petitioner, said seizure being had pursuant to the conditional sales contracts reserving title in the petitioner, this action was instituted by the trustee in bankruptcy against this petitioner to recover possession of said automobiles. The title to this

property was at all times in the defendant, and no property in said automobiles was ever acquired by the bankrupt. The conditional-sales contracts prohibited either the sale or use of these automobiles by Lee; the petitioner was constantly vigilant that the terms of the contract should be complied with. From the very day of the delivery of these automobiles to the possession of Lee, under said conditional-sales contracts, the petitioner was constantly alert to see that they did not leave Lee's possession, having time and again visited Lee's storeroom for the purpose of "checking" these cars.

Errors Assigned Intended to be Urged.

The United States Circuit Court of Appeals for the Fourth Circuit erred:

1. In its refusal to follow the rule in Bailey *vs.* Baker Ice Machine Company, construing Section 47 (*a*) of the Bankrupt Act, as amended by the Act of 1910, so as to fix the rights of the trustee in bankruptcy as a lienor as of the date of the filing of the petition.

2. In that it failed to follow the construction by the Supreme Court of Appeals of Virginia of the so called "Traders' Act," Section 5224 of the Code of Virginia, that court being the highest court of the State of Virginia, which construction is clear that said act has no application to property recaptured from the possession of the trader and is for the protection of lien creditors only.

3. That the judgment of the Circuit Court of Appeals for the Fourth Circuit, fixing the rights of the trustee in bankruptcy as a lienor at a time anterior to the filing of the petition, is a departure from the rule of decision of this Honorable Court in Bailey vs. Baker Ice Machine Company, 239 U. S., 268, which rule of decision is followed by the other circuits of the United States and, therefore, creates a conflict of decision in the several circuits of the United States.

ARGUMENT.

The Circuit Court of Appeals for the Fourth Circuit, by its judgment, holds that the rights of the trustee "depend upon the so-called 'Traders' Act' of Virginia—Section 5224 of the Code of Virginia," which is as follows:

> "If factor, agent, etc., who is a trader, fail to disclose name of principal or partner, or do business in his own name, property used in such business liable for his debts; exception. If any person transact business as a trader with the addition of the words 'factor,' 'agent' and 'company,' or 'and Co.,' and fail to disclose the name of its principal or partner by a sign in letters easy to be read placed conspicuously at the house wherein such business is transacted, and also by a notice published for two weeks in a newspaper (if any) printed in the City, town or county wherein the same is transacted; or if any person transact such business in his own name, without any such addition; all the property, stock and choses in action acquired or used in such business shall, as the creditors of any such

> person, be liable for the debts of such person. This section shall not apply to a person transacting such business under a license to him as an auctioneer or commission merchant."

and construes said "Traders' Act" so as to make liable for the debts of "general creditors" the property which had been in the possession of the bankrupt as a part of his ordinary stock in trade within four months prior to the filing of a petition in bankruptcy, even though the bankrupt never had actual title to said property and such property had been recaptured and taken into possession by the true owner thereof prior to filing of a bankruptcy petition and the existence of any lien creditor.

The Supreme Court of Appeals of Virginia, in Capitol Motor Company vs. Lasker, 138 Va., p. 630, reaffirming a long line of decisions, held:

a. That under the Virginia law a trustee under a deed of assignment, upon the recordation of the deed, becomes a lienor.

b. That the word "creditors" as employed in the Virginia Traders' Act (Virginia Code, Section 5224) means "lien creditors."

c. That property in the possession of a trader, as a part of his general stock of merchandise, while so possessed, is subject to the provisions of the "Traders' Act," but when repossessed by the true owner thereof, before any lien has attached thereto, such property is no longer subject to the provisions of said "Traders' Act."

That such is the true construction of said Section 5224 of the Code of Virginia—"Traders' Act"—is amply supported by the language of the Supreme Court of Appeals of Virginia in the case of Capitol Motor Company *vs.* Lasker, *supra*, cited by the Circuit Court of Appeals for the Fourth Circuit, in support of its ruling, to which language we most respectfully direct the attention of the court.

At page 637 of volume 138, Virginia Reports, it is said:

> "The main questions involved may be stated thus: (1) Were the eight automobiles or any of them, liable to the creditors of the defendant under Section 5224 of the Code, known as the Traders' Act; and (2) did White, the assignee, have the right to recover the eight automobiles, or any of them, for the benefit of the creditors of the defendant?
>
> "So much of Section 5224, Code of 1919, as is applicable, is as follows: 'If any person transact such business in his own name * * * all the property, stock and choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for the debts of such persons.'
>
> "It is earnestly contended by counsel for the defendant that in construing this statute the question of the true ownership of the property is not involved, that the only question for determination is whether the stock or property was acquired or used in such business. Citing Hoge *vs.* Turner, 98 Va., 624. That the lien which the plaintiff seeks to assert is a secret lien and is in fraud of the rights of the general creditors.

"Judge Riely, in delivering the opinion of the court in Hoge *vs.* Turner, *supra*, said: 'The purpose of the legislature in enacting the statute, as the title of the original act passed March 28, 1839, shows, was to prevent persons carrying on business under false or fictitious names and firms. To prevent fraud,' etc.

"Numerous cases have been cited dealing with this statute. Edmunds *vs.* Hoffie Piano Co., 97 Va., 588; Partlow *vs.* Lickliter, 100 Va., 63; Virginia Book Co., Inc., *vs.* Site, 254 Fed., 46; Boice *vs.* Finance and Guaranty Corporation, 127 Va., 563.

"In all of these cases the question presented was either a contest between the trader and creditors, between judgment creditors and lienor, or between an innocent purchaser for value and lienor or seller. The instant case is different. Here there is no contention that the dealer is trying to perpetrate a fraud on its creditors. On the contrary, the dealer, or to be more exact, its assignee, is extremely virtuous and is seeking to prevent one of its creditors from perpetrating a fraud upon all of its other creditors. If the act of the plaintiff is fraudulent, it was rendered so by the acquiescence of the defendant. We do not think the action of the plaintiff was in any respect fraudulent. It had a right to enter into the transaction, taking as it did the risk of having the automobiles subjected to the debts of defendant before it could enforce its trust lien. So as between plaintiff and defendant the recordation of the trust agreement was an immaterial matter. But as between plaintiff and the other creditors of defendant a different situation is presented.

"Until the institution of the action of detinue and the execution and recordation of the deed of assignment, we have no difficulty in holding that the eight automobiles constituted in part the apparent assets of the defendant dealer, and could be subjected to satisfy the claims of creditors, that is, lien creditors.

"(1) In answering question number one, we are of the opinion that a proper construction of the 'Traders' Act' (Sec. 5224) is that the act is applicable only to property, stocks, etc., used in the business of the trader, i. e., property, stocks, etc., which constitutes, in whole or in part, the apparent assets of the business of the trader, at the time in question; and that the creditors who are entitled to claim the benefit of such act are lien creditors only, or some representative of theirs, such as their trustee, and that whether the lien be obtained by deed of trust, execution, or otherwise, is immaterial.

"(2) In answering question number two, we are further of the opinion that White, trustee, was the proper one to intervene in the detinue action; that as trustee under the deed of assignment, he was the representative of the creditors of defendant, who immediately upon the recordation of the deed of assignment became lien creditors."

And again, at page 641:

"Upon applying the construction of the Traders' Act as stated, *supra*, to the instant case, we find the following to be the situation:

"On November 4, 1921, plaintiff by its action of detinue instituted, and its bond given that day, and the possession taken that day by the

sheriff under the bond, repossessed itself of six of the automobiles on that day; so that after November 4th, those six automobiles were no longer a part of the apparent assets of the business of the trader, the defendant. That is to say, after that date the Traders' Act was no longer applicable to those six automobiles.

"The deed of trust to White, trustee, executed on November 7th, could not and did not convey any rights under the Traders' Act to White, trustee, or to any creditors, as to the six automobiles. But as to the other two automobiles, plaintiff did not obtain possession of them until November 10, 1921. They, until that date, continued to be part of the apparent assets of said trader, the defendant. They, therefore, as property to which the Traders' Act was applicable, passed to the trustee, by virtue of the deed of trust executed on November 7, 1921, which gave to the creditors, secured in that deed, or the trustee as assignee for their benefit, the right to claim the benefit of the act as to the two automobiles and to recover the same."

The property, which is the subject of this litigation, was repossessed by the true owner on January 10, 1922, ten days prior to the filing of the bankruptcy petition.

Under the Virginia decisions, upon such repossession, it ceased to be subject to the provisions of the Traders' Act.

Ten days prior to the filing of the bankruptcy petition said property ceased to be any part of the apparent assets of the then trader and subsequent bankrupt.

Under the authority of Bailey vs. Baker Ice Machine Company, *supra*, the trustee in bankruptcy's status as a lienor became fixed ten days after the Virginia Traders' Act ceased to be applicable to the property of the petitioner.

It therefore follows that the rights of your petitioner were fixed on the 10th day of January, 1922, when it repossessed its property, and that the rights of the trustee in bankruptcy were fixed on the 20th day of January, 1922, when the petition was filed (R., 1-2).

We respectfully submit that the ruling of this Honorable Court in Bailey vs. Ice Machine Company, *supra*, is conclusive of the legal propositions here involved, and that the Circuit Court of Appeals for the Fourth Circuit, having failed to follow said ruling, that its decision and judgment is erroneous and if permitted to stand would work great injustice to your petitioner and all persons similarly situated.

It is most respectfully submitted that under a proper construction of the Virginia Traders' Act said act could have no application to the property repossessed by your petitioner ten days prior to the filing of the bankruptcy petition, and that the rights of the trustee in bankruptcy as a lienor, being fixed as of the time of the filing of the bankruptcy petition, that he had no claim upon or lien against said property, and that the Circuit Court of Appeals for the Fourth Circuit erred in so holding.

The rights of the trustee in bankruptcy being fixed by the provisions of 47 A of the Bankruptcy Act, as construed by this Honorable Court in Bailey vs. Baker, etc., *supra*, that the said Circuit Court of Appeals for

the Fourth Circuit were bound by such ruling and when applied to the facts of this case should have held that the property which is the subject of this litigation was not subject to any claim by the trustee.

That the repossession by your petitioner of its property ten days prior to the filing of the bankruptcy petition did not constitute a voidable preference as against the trustee in bankruptcy within the meaning of Section 60 B of the Bankrupt Act is clear under the authority of Bailey vs. Baker, etc., *supra*, in which this Court said:

> "The question next to be considered is whether the contract operated as a preferential transfer by Grant Brothers within the meaning of Section 60b of the Bankruptcy Act, as amended June 25, 1910, Chap. 412; 36 Stat. at L., 838, 842; Comp. Stat., 1913, Sections 9586, 9644, which declares that 'a transfer' by a bankrupt 'of any of his property' shall be voidable by the trustee, if it be made or recorded (when recording is required) within four months before the petition in bankruptcy is filed, and 'the bankrupt be insolvent and the * * * transfer then operate as a preference,' etc. The section leaves no doubt that to be within its terms the transfer must be one which a bankrupt makes of his own property and which operates to prefer one creditor over others; and if further light be needed there is a declaration in the Bankruptcy Act (Section 1, clause 23) that the word 'Transfer' shall be taken to include every mode 'of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift

or security" (30 Stat. at L., 545; Chap. 541, Comp. Stat., 1913, Section 9585). It, therefore, is plain that Section 60b refers to an act on the part of a bankrupt whereby he surrenders or encumbers his property or some part of it for the benefit of a particular creditor, and thereby diminishes the estate which the Bankruptcy Act seeks to apply for the benefit of all creditors. New York County Nat. Bank *vs.* Massey, 192 U. S., 138, 147; 48 L. Ed., 380, 384, 24 Sup. Ct. Rept. 199. Applying this test to the contract in question, we think it did not operate as a preferential transfer by Grant Brothers, the bankrupts. The property to which it related was not theirs, but the Baker Company's. The ownership was not transferred, but only the possession, and it was transferred to the bankrupts, not from them. Being only conditional purchasers, they were not to become the owners until the condition was performed. No doubt the right to perform it and thereby to acquire the ownership was a property right. But this right was not surrendered or encumbered. On the contrary, it remained with the bankrupts and ultimately passed to the trustee, who was free to exercise it for the benefit of the creditors. So there was no diminution of the bankrupt's estate.

"Under the recording law of Kansas a contract of conditional sale is valid between the parties, whether filed for record or not, but is void as against a creditor of the vendee who fastens a lien upon the property by execution, attachment, or like legal process before the contract is filed for record. Gen. Stat., 1909, Sec. 5237; McVay *vs.* English, 30 Kans., 368, 371;

1 Pac. 795; American Lead Pencil Co. *vs.* Champion, 57 Kans., 352, 357; 46 Pac., 969; Youngberry *vs.* Walsh, 72 Kans., 200, 227; 83 Pac., 972; Geyser M. F. G. Co. *vs.* Murray, 84 Kan., 450, L. R. A.; 114 Pac., 1046; Paul *vs.* Lingenfelter, 6969 Kan., 871; 132 Pac., 1179; Geppelt *vs.* Middlewest Stone Co., 90 Kan., 539; 135 Pac., 1026; Big Four Implement Co. *vs.* Wright, 47 L. R. A. (N. S.), 1223; 125 C. C. A., 577; 207 Fed., 535. Here the contract was made October 14th, 1911, and filed for record May 15, 1912. In the meantime no creditor fastened a lien upon the property by execution, attachment, or other legal process. But it is contended that Section 47-A, clause 2, of the Bankruptcy Act, as amended in 1910, Chap. 412, 36 St. at L., 838; 80 Comp. Stat., 1913, sections 9586, 9631, gave the trustee the status of a creditor having such a lien. That section provides that a trustee in bankruptcy, 'as to all property in the custody or coming into the custody of the bankrupt court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings.' Although otherwise explicit, this provision does not designate the time as of which the trustee is to be regarded as having acquired the status indicated, and yet some point of time must be intended. Is it the date of the trustee's appointment, the filing of the petition in bankruptcy, or some time anterior to both? When not otherwise specially provided, the rights, remedies, and powers of the trustee are determined with reference to the conditions existing when the petition is filed. It is then that the bankruptcy proceeding is in

itiated, that the hands of the bankrupt and of his creditors are stayed, and that his estate passes actually or potentially into the control of the bankruptcy court. We have said 'the filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as in *custodia legis* from the filing of the petition.' Acme Harvester Co. vs. Beeckman Lumber Co., 222 U. S., 300, 307; 56 L. Ed., 208, 213; 32 Sup. Ct. Rep., 96. And again: 'We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed, and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition.' Everett vs. Judson, 228 U. S., 474, 479; 57 L. Ed., 927, 929; 46 L. R. A. (N. S.), 154, 33 Sup. Ct. Rept., 568. And see Zavelo vs. Reeves, 227 U. S., 625, 631; 57 L. Ed., 676, 678; 33 Sup. Ct. Rep., 365; Ann. Cas., 1914 D, 664. Had it been intended that the trustee should take the status of a creditor holding a lien by legal or equitable process as of a time anterior to the initiation of the bankruptcy proceeding, it seems reasonable to believe that some expression of that intention would have been embodied in Section 47 A, as amended. As this was not done, we think the better view, and one which accords with other provisions of this act, is that the trustee takes the status of such a creditor as of the time when the petition in bankruptcy is

> filed. Here the petition was filed almost two months after the contract was filed for record, and therefore the trustee was not entitled to assail it under the recording law of the State."

In the case of Firestone Tire & Rubber Co. *et al. vs.* T. C. Cross, Trustee in Bankruptcy of the Capital City Garage & Tire Co., decided by the Circuit Court of Appeals for the Fourth Circuit on January 11, 1927, 17 Fed. (2d), 417, the court said:

> "In the light of the foregoing decisions, there can be no doubt whatever that, under the present state of the law in South Carolina, while a mortgage, conditional sales contract, or contract of bailment is void as against subsequent creditors of the mortgagor, vendee, or bailee, unless recorded pursuant to the statute, nevertheless, if it be recorded after the statutory period, it is then good against all creditors who have not in the meantime secured some lien upon the property. If therefore the contracts in this case had been recorded at any time prior to the filing of the petition in bankruptcy, there can be no doubt that they would have been good against general creditors and against the trustee in bankruptcy. It is true that the contracts were not recorded, but it is undisputed that six weeks before the petition in bankruptcy was filed, the property embraced in the contracts was repossessed by the owners and taken from the custody of the bailee. Can there be any question that this recaption of the property was as effective for preserving the rights of the owners as the mere recording of the contracts would have been? Recording would only have been con-

structive notice of defendants' claims. The reception was actual notice and more than actual notice of the claims of defendants, for it withdrew the property itself from the possession of the bailee. If it be said that it is a hardship on creditors who have extended credit on the faith of the bankrupt's possession that their claims should be defeated by this reception of the property by the owners, the answer is that their claims could undoubtedly be defeated by the mere recording of the contract at any time before they secure a lien on the property, and that the hardship is no greater in the one case than in the other. If the bailor can continue to leave the property in the possession of the bailee and protect his rights against prior unsecured creditors by merely placing the contract on record, he certainly should be able to protect them by terminating the contract, and taking the property back into his possession.

That the reception of property under statutes, interpreted as are the recording acts of South Carolina, is as efficacious to protect the rights of the owners as registration is, we think, supported not only by reason but also by authority. Remington on Bankruptcy (3rd Ed.), Vol. 4, Sec. 1570, states the rule applicable to such cases as follows: "If possession is taken by the mortgagee or conditional vendor before the bankruptcy petition is filed, such taking of possession operates as a filing and the lien will be good although bankruptcy follows within four months, unless the mortgage or conditional sale is void otherwise as a preference, or void as containing a power of sale."

The rule and the reason for it are well stated by the late Judge Woods, speaking for the

Court, in Industrial Finance Corporation *v.* Cappelmann (C. C. A. 4th), 284 F., 8, 11, as follows: "When a State recording statute, as construed by the State court, only provides for protection against unrecorded instruments of 'lien creditors' or 'creditors who have fastened a lien on the property,' or 'creditors armed with judicial process,' or the like, it has been held that the trustee cannot recover the property when the holder of an unrecorded mortgage or other instrument requiring record acquires possession before the filing of the petition in bankruptcy. This holding is on the express ground that the rights of no creditors had attached to any of the property until the petition was filed; that the trustee did not until then acquire the right of a lien creditor and therefore could not recover property which had *bona fide* passed from the possession and ownership of the bankrupt before the petition was filed." • • •

"Other cases supporting the position that taking possession will supply the place of registration are Duffy *v.* Charak, 236 U. S. 97, 35 S. Ct. 264, 59 L. Ed. 483; Woods *v.* Stemple (C. C. A. 4th), 289 F. 239; Hagan *v.* McNiel (C. C. A. 6th), 13 F. (2d) 852; *In Re* Thomas Electric Corporation (C. C. A. 7th), 283 F. 392; First State Bank of Crook, Colo., *v.* Fox (C. C. A. 8th), 10 F. (2d), 116.

"So far we have dealt with the taking of possession as though the contracts in question were mortgages under which possession had been taken by the mortgagee. As a matter of fact, however, in taking possession of the property in this case, defendants were not seizing it to hold as security for a debt, but as property which belonged to them absolutely and uncon-

ditionally, the title to which they had never parted with even conditionally. It had been placed in the hands of bankrupt as bailee but remained at all times the property of defendants. When the contracts were terminated and possession taken by defendants, in accordance with their terms, the contracts were completely executed and ended, and there was no right of redemption or other interest in the property, on the part of the bailee. To hold in such case that the rights of the owners were not protected by what was done, but that they would have been protected by merely placing the contracts on record while allowing the goods to remain in the possession of bankrupt, would be manifestly absurd.

"We have discussed the questions involved at considerable length, because the decision of this court in the case of Industrial Finance Corporation v. Cappelmann, 284 F. 8, is apparently in conflict with the decision here. That was a case involving the rights of the holder of an unrecorded chattel mortgage under the registration laws of South Carolina, but it was rendered before the Supreme Court of that State had decided the case of Carroll v. Cash Mills, *supra*, construing the amendment of 1914. An examination of the opinion in the Cappelmann Case will show that the court did not consider the effect on the registration statutes of the amendment of 1914, but based its decision on the assumption that it was still the law of South Carolina that 'the rights of subsequent simple contract creditors for value without notice against conveyances or liens not recorded as required by the statute accrue when the credit is ex-

tended, and cannot be defeated by any subsequent action of the holder of the secret conveyance or lien.' As shown above, this is the view which has been expressly repudiated by the Supreme Court of South Carolina, construing the amendment, which was apparently overlooked in the Cappleman Case. Of course, the construction put upon the statute by the courts of the State, in a case like the present, must control the Federal courts. Cutler v. Huston, 158 U. S., 423, 15 S. Ct. 868, 39 L. Ed. 1040.

"As the defendants took possession of the property in question prior to the filing of the petition in bankruptcy, we do not think, in the light of the interpretation placed upon the registration statutes of South Carolina by the Supreme Court of that State, that the trustee is entitled to recover either the property or its value. The trustee is vested by law merely with the title of the bankrupt as of the date he was adjudged a bankrupt. Bankruptcy Act, Sec. 70 (a), being Comp. St. Sec. 9654. He may avoid any transfer which any creditor might have avoided. Section 70 (e). And, as to property in the custody of the bankruptcy court, he is vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and, as to the property not in the custody of the court, is vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. Section 47 (a) as amended by Act of June 25, 1910 (Comp. St. Sec. 9631). The bankrupt had no title to the property in controversy when the petition in bankruptcy was filed, and, as shown above, it had not been transferred by a

JAN 3 1928
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 170.

FINANCE AND GUARANTY COMPANY,
PETITIONER,

vs.

HENRY W. OPPENHIMER, TRUSTEE IN BANKRUPTCY FOR W. A. LEE, TRADING AS NATIONAL MOTOR COMPANY, BANKRUPT, RESPONDENT.

BRIEF FOR RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

J. VAUGHAN GARY, and
JOSEPH M. HUBY, JR.,
Richmond, Virginia,
Counsel for Respondent.

(32,425)

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Burks on Pleading and Practice, 168. 4
Capitol Motor Corp. v. Lasker, 138 Va. 630. . 22, 23 & 25
Chesapeake Shoe Co. v. Seldner, 122 Fed. 593. . 9, 11 & 15
Edmonds v. Hobbie Piano Co., 97 Va. 588. 10
Firestone Tire & Rubber Co. v. Cross, 17 Fed. (2nd) 417. 27
Hoge v. Turner, 96 Va. 624. 8
Nusbaum, Trustee, v. City Bank and Trust Co., 132 Va. 54. . . . . 9, 12, 25, 27 & 29
Partlow v. Lickliter, 100 Va. 631. . . . . 10 & 11
Virginia Book Co. v. Sites, 254 Fed. 46. . . . . 11 & 22
Virginia Code, 5224. 7

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 170.

FINANCE AND GUARANTY COMPANY,
PETITIONER,

vs.

HENRY W. OPPENHIMER, TRUSTEE IN BANKRUPTCY FOR W. A. LEE, TRADING AS NATIONAL MOTOR COMPANY, BANKRUPT, RESPONDENT.

BRIEF FOR RESPONDENT.

Before going into a discussion of the main questions presented in this case we desire to call the attention of this Honorable Court to an item of $700.00 and interest, as to which we understand there is no controversy, this item being for certain extra equipment on the automobiles which are the subject of this suit.

The four Velie automobiles, which are the subject matter of this litigation, and which were claimed by the

Petitioner, Finance and Guaranty Company, when first bought by the Bankrupt and when the titles thereto were reserved by the Petitioner, did not have placed thereon certain extra equipment, and the Petitioner never had any lien on this equipment or any claim thereto.

The uncontradicted testimony of the wife of the Bankrupt in this connection is as follows:

> "That the four Velie cars were touring cars, one a model 48 and three model 34, the 34's selling at around $1,385.00 f. o. b. factory, and the 48 at between $1,500.00 and $1,800.00 f. o. b. factory, this being the price without extra equipment, such being the condition of the cars when the liens of defendant were put on the cars; that afterwards the model 48 was fully equipped with every extra equipment that could be put on an automobile and the other cars had extra equipment such as bumpers and pilot lights, and that the value of the extra equipment was between $800.00 and $1,000.00." (R., 25.)

When, however, the Petitioner repossessed the four automobiles they repossessed the automobiles along with the extra equipment placed thereon and the automobiles and this extra equipment were sold by them.

When the case was first tried in the District Court, Judge Groner decided against the Trustee in Bankruptcy with respect to the four automobiles, but allowed the Trustee in Bankruptcy to recover for the value of this extra equipment, that portion of the order being as follows: (R., 14.)

> "This day came the parties in the above action, by their attorneys, and by agreement of parties, trial by jury was waived, and all matters of law and fact are submitted to the Court, and the Court having fully heard the evidence, doth consider that the plaintiff recover of the defendant the sum of $700.00 and one-half of his costs herein, and no more."

The order of the District Court directing the entry of this judgment is as follows: (R., 15.)

> "The claim for extra equipment, I think should be allowed. This extra equipment, according to the evidence, was all placed on the cars after the conditional sales contracts were executed and recorded. The amount which is chargeable to this item is stated in the evidence at from $700.00 to $1,000.00. It was not itemized and it is doubtful whether the amount is exactly correct, and yet it is all the evidence that was before me on the subject. The case was regularly tried and I know of no good reason to re-open it and re try this question. The Clerk will, therefore, enter judgment for the plaintiff for seven hundred dollars ($700.00) and costs divided."

The Trustee in Bankruptcy sued out a writ of error from this judgment to the Circuit Court of Appeals for the Fourth Circuit for the reason that the decision was against him as to the four automobiles, and the Finance and Guaranty Company has never assigned error or objected to the $700.00 allowed the Trustee in Bankruptcy for this extra equipment. Consequently, therefore, regardless of the decision of this Honorable Court as to the merits of the main controversy, we respectfully submit that any decision should provide for this amount of $700.00 for the extra equipment, and it is our understanding that the Finance and Guaranty Company does not deny this claim.

Since these automobiles, together with the extra equipment, were repossessed on January 10, 1922, the conversion of the extra equipment took place on that day, and interest on the $700.00 should be allowed from January 10, 1922.

In Cooley on Torts (Student's Ed.), page 420, it is said:

"Any distinct act of dominion wrongfully exerted over one's property in denial of his rights, or inconsistent with it, is a conversion."

In 26 Ruling Case Law, page 1120, it is said:

"The rule is well settled that the wrongful seizure of the property of one person under legal process directed against another amounts to a conversion, for which an action of *trover* may be maintained against the officer who makes the seizure or against the person who directed the officer to act."

In Burk's Pleading and Practice, Section 166, which is the standard book on the subject in Virginia, Judge Martin P. Burks, now on the Supreme Court of Appeals of Virginia, being the author, it is said:

"Any appropriation of property in disregard or defiance of the owner's rights in it will amount to a conversion and this conversion may be proved in three ways: (1) By a tortious taking; (2) by any use or appropriation to the use of the person in possession, indicating a claim of right in opposition to the rights of the owner; (3) by refusal to give up the possession to the owner on demand. In the last case the possession may have been in the first instance lawful, but ceases to be lawful upon refusal to deliver to the owner on demand."

In Section 169 this author says:

"As a general rule, the measure of damages where the conversion is complete is the value of the property converted at the time of the conversion, with interest thereon from that date."

In *Cecil* v. *Clarke*, 49 W. Va. 459, it is said:

"The measure of damages in *trover* is the value of the property and interest thereon from the time of conversion."

What we have said above, however, is not to be construed as in any way waiving our claim as to the full value of the four automobiles so repossessed by the Finance and Guaranty Company.

FACTS.

The facts in this case are so clearly and succinctly stated by the late Judge Rose in his opinion in this case that we would not attempt to improve on his language. After stating that he will for the sake of brevity refer to the Trustee in Bankruptcy as the Trustee and to the Finance and Guaranty Company as the Vendor, he makes the following terse statement of this case (R., 17; see also 5 Fed. (2nd), p. 486):

> "The bankrupt, one W. A. Lee, traded as the National Motor Company. No one else was interested in the business which was that of buying and selling automobiles. The Vendor financed the purchase of automobiles for Lee and was the vendor of the cars to him. The sale was made on the instalment plan and by the agreements between the parties, which were duly recorded, the legal and equitable title to the automobiles was to remain in the Vendor until the final payment of the last instalment of the purchase money and the performance by the bankrupt of the other terms of the agreement. These contracts contained other provisions, such as that the bankrupt could not mortgage, rent, pawn, dispose of, or sell, the property, without the permission of the Vendor, first obtained in writing. There is no question, however, that the bankrupt bought the automobiles to sell again and that the Vendor was at all times aware of this intention. The agreements, all substantially identical in form, bore date at various times from the 28th of April, 1921, to the 6th of August, in the same year.
>
> On the 26th of December, 1921, Lee left Richmond, for parts unknown and so far as the record discloses, has not been heard of since. On the 10th

of January, the Vendor instituted suit in *detinue* in the law and equity court of the City of Richmond and in the initial affidavit, its duly authorized agents swore that there was good reason to believe that Lee was insolvent. In execution of the writ issued in the case, the sheriff of Richmond on the same day seized the automobiles and delivered them to the Vendor. Ten days later, on the 20th of January, an involuntary petition in bankruptcy was filed against Lee and he was on the 25th of February adjudicated a bankrupt.

On the 15th of December, 1922, the Trustee filed a petition in the instant proceedings against the Vendor alleging that the taking and possession by it of the four automobiles in question amounted to a voidable preference and praying an order for the return of the automobiles or the payment of the money value thereof."

The statement in the brief of counsel for the petitioner, on page 4 thereof, and the opinions of the District Court for the Eastern District of Virginia, and of the Circuit Court of Appeals for the Fourth Circuit, copied in the printed record, correctly set forth the previous course of this litigation. The opinion of the Circuit Court of Appeals for the Fourth Circuit, delivered by Judge Rose with his usual force and clarity (R., 17, also 5 Fed. (2nd), p. 486), is in effect the decision of the merits of this case and is the decision from which the Petitioner is appealing.

ARGUMENT.

At the very threshold of our argument we want to say that our case rests entirely and solely on Section 5224 of the Code of Virginia (1919) commonly known as the "Traders' Act", taken in connection with the Bankruptcy Act, and without this section of the Code of Virginia it would have been useless to institute this suit. Our position is that the repossession of these four au-

tomobiles by the Petitioner in view of the Virginia "Traders' Act" constituted a voidable preference in bankruptcy, and the suit was instituted by the Trustee in Bankruptcy in order to set aside this voidable preference.

On account of a typographical error in the brief of counsel for the Petitioner in quoting this statute, it is set forth here, being as follows.

> "IF A FACTOR, AGENT, ETC., WHO IS A TRADER, FAIL TO DISCLOSE NAME OF PRINCIPAL OR PARTNER, OR DO BUSINESS IN HIS OWN NAME, PROPERTY USED IN SUCH BUSINESS LIABLE FOR HIS DEBTS: EXCEPTION.
>
> If any person transact business as a trader, with the addition of the words 'factor', 'agent', 'and company', or 'and Co.', and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house wherein such business is transacted, and also by a notice published for two weeks in a newspaper (if any) printed in the city, town, or county wherein the same is transacted; or if any person transact such business in his own name, without any such addition; all the property, stock, and choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for the debts of such person. This section shall not apply to a person transacting such business under a license to him as an auctioneer or commission merchant."

This Statute has been on the statute books of Virginia since 1839. It has been copied almost verbatim in the Codes of West Virginia and Mississippi, but with these two exceptions we know of no State in the Union which has any provision of law which is anyway similar to it. It has been construed many times by the Supreme Court of Appeals of Virginia (the court of last resort in that State), and also by the United States District Courts

in Virginia and the Circuit Court of Appeals for the Fourth Circuit. As a result of these decisions the purpose and meaning of the statute have become well established and business has adapted itself to it.

THE TRUE NATURE OF THE VIRGINIA "TRADERS ACT".

The practical effect of the statute, as construed by the Virginia Courts, is that so far as creditors of the trader are concerned, the property is to all intents and purposes the property of the trader. As between creditors of the trader and the actual owner of the goods, the actual owner is estopped from claiming the goods and is estopped from denying that they are the property of the trader.

In *Hope* v. *Turner*, 96 Va. 624, it is said:

> "The purpose of the Legislature in enacting the statute, as the title of the original act passed March 28, 1879, shows, was to prevent persons carrying on business under false or fictitious names and firms. The object was to prevent fraud; to compel any person transacting business as a trader to disclose the name of the real owner of the business, if any other there be; to prevent any shifting or evasion of ownership and liability for debts in case of controversy; and to preclude the assertion of secret claims of ownership against creditors of him who has conducted the business, possessed the property, and appeared to be its owner.
>
> The language of the statute is plain, explicit, and imperative. It leaves no room for exception or qualification. If any person, as is alleged in this case, transact business as a trader in his own name with the addition of the word 'Agent', or in his own name, without such addition, and fail to comply with the provisions of the statute, it makes all the property, stock, and choses in action acquired or used in such business absolutely liable for his debts,

whether contracted in the particular business or not, and without regard to knowledge by the creditor of the principal, if principal there be. Knowledge, or want of knowledge, plays no part in the application of the statute. That is an immaterial matter. The only question is whether the person was doing business as a trader within the meaning of the statute, and has complied or failed to comply with its positive requirements."

In *Chesapeake Shoe Co.* v. *Selsnor*, 122 Fed. 593, the first case decided by the Circuit Court of Appeals for the Fourth Circuit which construes and applies this statute in a case of bankruptcy, Judge McDowell thus states the intent of the statute:

"The Virginia Statute does not in express terms declare that the title of goods consigned to the trader doing business in his own name, shall be vested in the trader. But its intent is clearly to make such goods the property of the trader quoad his creditors."

. . . . .

"To all intents and purposes, so far as his creditors' rights are concerned, this statute vests in the trader the title to the consigned goods. It precludes the assertion of secret claims of ownership by the consignor. In other words, it avoids the title of the consignor and gives title to the trader."

This case has been frequently cited and approved by the Virginia Court.

In *Nusbaum, Trustee in Bankruptcy*, v. *City Bank and Trust Company*, 132 Va. 54, it is said:

"Such property, being liable under the Virginia Statute, is quoad his creditors like the other property of the trader to which he has absolute title,

and hence in case of bankruptcy constitutes assets for distribution to his creditors."

In his opinion in the instant case, after a full review of the Virginia decisions, Judge Rose thus states the effect of the statute:

"Fifth, that goods in the possession of a merchant under the circumstances above stated are quoad his creditors his property."

In view of these cases construing the statute, therefore, we believe that there can be no question that so far as creditors of the trader are concerned, the goods are to all intents and purposes the property of the trader, and that when we come to consider any particular case, the true test is, would the transaction questioned be allowed to stand if the goods belonged in fact to the trader. If the transaction could be attacked were the goods in point of fact the goods of the trader, then it can also be attacked if the goods are used by the trader in his business and are thereby by the statute made his in contemplation of law.

In *Edmunds* v. *Hobbie Piano Co.*, 97 Va. 588, the trader was a corporation engaged in buying and selling musical instruments, and some pianos and organs which the trader had in its possession on consignment contracts were levied on by general creditors. The Court held that the title of the creditors was superior to that of the consignor.

In *Partlow* v. *Lickliter*, 101 Va. 631, one William F. Lickliter was in business as a merchant and was largely indebted to Fannie L. Partlow, and in order to secure her or to pay the debt, he executed to her a Bill of Sale which was duly recorded, but he continued to conduct the business in his own name. Thereafter he confessed judgment in favor of Ella F. Lickliter, and the City

Sergeant thereupon levied on the personal property used in the business. In the interpleader proceedings it was held that the title of the judgment creditor was superior to that of the person holding the recorded Bill of Sale.

In the case last mentioned the Court held that the recordation of the lien was immaterial. This holding was incorporated into the Virginia Code of 1919, by an amendment to Section 5194, this being the section dealing with the recordation of instruments, the amendment being as follows:

> "A recordation under this section shall not affect the rights of a creditor acquired under section fifty-two hundred and twenty-four."

The Code Revisors, in their notes to this section, say:

> "The last sentence is new and makes statutory the decision in *Partlow* v. *Lickliter*, 100 Va. 631."

In the case of *Chesapeake Shoe Co.* v. *Seldner*, 122 Fed. 593, the facts are that Small, a retail shoe dealer, was adjudicated a bankrupt and there came into the possession of his trustee in bankruptcy a certain quantity of shoes which had been sent Small on consignment by the Chesapeake Shoe Co. The Chesapeake Shoe Co. claimed these shoes, but the Referee, to whom the matter was referred, reported adversely to this claim, holding that under the Virginia "Traders' Act" the property became liable to the bankrupt's creditors. This holding was sustained by the District Court and also by the Circuit Court of Appeals for the Fourth Circuit.

In the case of *Virginia Book Co.* v. *Sites*, 254 Fed. 46, decided by the Circuit Court of Appeals for the Fourth Circuit, in 1918, the facts are that one Magee

was a bookseller at Salem, Va., and was the local agent for the Virginia Book Co., selling for it books consigned to him. He filed his voluntary petition in bankruptcy, but two days before his petition was filed and when the Virginia Book Co. had reason to believe he was insolvent, said Book Company repossessed such of its books as Magee had on hand. Upon petition of the Trustee, the Referee ordered a return of the books, which on appeal was upheld by the District Court and also by the Circuit Court of Appeals.

ANSWER TO THE ERRORS ASSIGNED BY THE PETITIONER.

As we understand from the petition for the Writ of *Certiorari* filed in this case, and the brief of counsel for the Petitioner, the contention of counsel for the Petitioner is that the decision of the Circuit Court of Appeals was erroneous in three respects, namely:

1. That the rights of the Trustee in Bankruptcy are fixed as of the date of the filing of the petition in bankruptcy.

2. That the Virginia decisions have no application to property recaptured and is for the protection of lien creditors only.

3. That the decision is at variance with the decisions in the other circuits of the Circuit Courts of Appeals.

THE NUSBAUM CASE.

Fortunately for a correct decision of this question, we confidently submit that the first two of these points have been finally and absolutely disposed of by the Supreme Court of Appeals of Virginia (the Court of last resort in that State), in the recent case of *Nusbaum*,

Trustee in Bankruptcy v. *City Bank and Trust Company*, 132 Va. 54, which case incidentally has nowhere been mentioned by counsel for the Petitioner. The opinion was written by Judge Prentis, now President of the Court.

The facts in the case are thus stated by Judge Prentis:

> "The plaintiff, Bertram S. Nusbaum, Trustee in Bankruptcy for Gatewood and Steinbaugh, Inc., filed his motion against the City Bank and Trust Company, alleging that there had been illegal transfer within the four months preceding the filing of the petition in bankruptcy, whereby the bank, as creditor of the bankrupt, had obtained a greater percentage of its debt than any other creditor of the same class, and that when the transfer was made, the creditor had reasonable cause to believe that such transfer would result in such a preference. There was a jury trial and a verdict in favor of the plaintiff, which the judge of the trial court set aside as contrary to the law and the evidence, and thereupon entered judgment in favor of the defendant, which is here for review.
>
> The pertinent facts as to which there is no conflict are these: The bankrupt corporation filed its petition October 14, 1919, and was subsequently adjudicated a bankrupt. It was engaged as a trader in buying and selling automobile accessories and supplies and in repairing such vehicles, and transacted all of its business in its corporate name, Gatewood and Steinbaugh, Inc. It had ordered thirty automobile trucks from Larrabee-Deyo Motor Truck Company, Inc., under a conditional sale contract, to be delivered at stated intervals, for resale, which contract was never recorded. Only one of these trucks appears to have been delivered, and the agreement with reference thereto appears to have been subsequently changed, and thereafter, on October 1, 1919, it was agreed that this truck should be held under a consignment contract with the power to the consignee to sell and obligation to account for

the proceeds thereof to the consignor, Larrabee-Deyo Motor Truck Company, Inc. This contract was never recorded. R. A. Williams, Secretary of the bankrupt corporation, a few days after the date of this consignment contract, stored the truck in his own name with the Southgate Terminal Corporation on October 3, sold it October 8, for $2,350.00, and paid the bank $2,250.00 in settlement of five notes of the corporation, of which only $808.08 was then due, the said Williams at the time being liable therefor as endorser; the effect of which was to enable the bank to obtain a greater percentage of its debt than any other creditor of the same class."

Continuing, Judge Prentis says:

"In the administration of the bankruptcy law, it is perfectly well settled that the State statutes enacted for the protection of creditors are given full force and effect, so far as they are not in conflict with the bankrupt law. It follows, therefore, that a preference or transfer may be unlawful or fraudulent under the statutes of one State which, under identical circumstances, would be held valid in another State. In most of the States, in the absence of a controlling statute, where there is such a bailment as here appears, the title of the bailor is superior to that of the trustee in bankruptcy who takes no title thereto, even if in the bankrupt's possession at the time of his appointment, and the trustee could not set aside a transfer thereof by the bankrupt in anticipation of bankruptcy."

Judge Prentis then reviews the cases of *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, and *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, so strongly relied on by Counsel for the Petitioner, showing how those decisions are not applicable to or in any way at variance with the situation which exists in Virginia on account of the unique "Traders' Act", found nowhere else except West Virginia and Mississippi, and thus states the real question at issue:

"The determination of the precise question here involved depends upon whether or not the automobile truck and its proceeds were assets in the possession of the bankrupt which could have been subjected by its general creditors, and its liability to be thus subjected depends upon whether or not the automobile and the proceeds arising from its sale were acquired by the bankrupt as a trader within the meaning of the Virginia traders' act. (Code 1919, Sec. 5224.)"

He then reviews the Virginia cases above mentioned and also the Federal cases of *Chesapeake Shoe Co.* v. *Soldiner* and *Virginia Book Co.* v. *Sites*, above referred to, and concludes as follows:

"Unless this line of cases is to be repudiated, it seems clear to us that the trial court erred in setting aside the verdict. The main purpose of the bankrupt act is to enforce equality as between the creditors of the same class, and hence it avoids all preferences made within the four months preceding the filing of the petition in bankruptcy. It is perfectly clear from the authorities that if the automobile truck had not been sold at the time the petition was filed, it would have constituted a part of the assets of the bankrupt for distribution among its creditors. It is also clear that if the proceeds of such sale had been held by the bankrupt at that time they would have passed as a part of his assets to the trustee in bankruptcy. It seems to us to follow logically and inevitably that as either the property or the proceeds arising from its sale could have been subjected by the general creditors to their debts under the Virginia statute, so the disposition thereof by the bankrupt for the benefit of one creditor in diminution of the assets to which all the creditors could have resorted, is clearly within the inhibition of the bankrupt act. Such property, being liable under the Virginia statute, is quoad his creditors like the other property of the trader to which he has absolute title, and hence in case of bankruptcy constitutes assets for distribution to his creditors.

> If we considered the question an open one, we might elaborate the reasons for this conclusion, but following the cases which we have cited, we regard it as closed, and, however great the possible hardship may be in some instances, those who deal with merchants in Virginia should take notice of the Virginia traders' act and be observant of the risks they incur as well as of the advantage accruing thereunder."

In order for there to be no possible misunderstanding of the exact points involved in this case (*Nusbaum* case) we have examined the printed record and the briefs filed in the clerk's office of the Supreme Court of Appeals of Virginia. The following was the decision of the lower court which was under review, as stated in the printed record:

> "In this case it is attempted to hold the defendant for a voidable preference, because it received ten days before the bankrupt filed his petition in bankruptcy the proceeds of sale of a motor truck that was held by the bankrupt (or one of the partners) under consignment from Deyo, etc.
>
> It cannot be doubted that the truck was at first held under a conditional sale and afterwards was put on consignment.
>
> Ten days before the petition in bankruptcy was filed the truck was sold and the proceeds used to pay off notes of the bankrupt held by the defendant herein.
>
> The Trustee in Bankruptcy asserts that this constitutes a voidable preference and that in consequence judgment should be given in favor of the plaintiff.
>
> In order to constitute a voidable preference the property conveyed must be the property of the bankrupt, or as the Courts say the 'estate of the bankrupt must be diminished thereby'. So the real question to be solved is was the proceeds of the truck part of the estate of the bankrupt quoad the trustee in bankruptcy.

It is clear that under the express terms of 47-A (1910) said trustee 'shall be deemed vested with all the rights of a judgment creditor holding an execution duly returned unsatisfied'. So the inquiry is put back one step further, viz., what are the rights of a judgment creditor and where do those rights vest under 47-A?

The Supreme Court of the United States has answered this question in at least two cases, (*Acme Harvester Company* v. *Beckman*, 222 U. S., and *Bailey* v. *Baker and Company*, 239 U. S. 268). In this last case the Court says in discussing this question: 'That section (47-A 1910) provides that a trustee in bankruptcy, as to all property in custody, etc., * * * shall be deemed vested with * * * rights of creditor holding a lien. * * * Although otherwise explicit this provision does not designate the time as of which the trustee is to be regarded as having acquired the status indicated, and yet some point of time must be intended. When not otherwise especially provided, the rights, remedies and powers of the trustee are determined with reference to the condition existing at the time of the filing of the petition. * * * We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed, and that the property which vests in the Trustee at the time of the adjudication is that which the bankrupt owned at the time of the filing of the petition.'

Applying this rule we find the truck in question here and its proceeds had passed out of the possession of the petitioner in bankruptcy and so could not be subject to any claim even of a lien creditor who did not become vested with the rights of such a lien creditor until the said petition was filed.

For these reasons I adhere to my formerly expressed opinion and will overrule the motion to set aside the judgment heretofore entered in this case."

It will thus be seen that the lower court, upon the authority of *Bailey* v. *Baker Ice Machine Company*, 239 U. S. 268, held exactly what is so earnestly contended

for by Counsel for the Petitioner here, namely, that the line of cleavage is the condition of affairs when the petition is filed. In reversing this decision, Judge Prentis points out that the lower court did not take into consideration the true nature of the "Traders' Act" and the other applicable provisions of the Bankruptcy Act, his language being as follows:

> "The learned judge of the trial court appears to rest his judgment largely upon the language of Section 47 A of the Bankrupt Act, as amended in 1910 (U. S. Comp. St., Sec. 9631), where it is said that the trustee 'shall be deemed vested with all the rights of a judgment creditor holding an execution returned unsatisfied', as though that language and that section defined and limited all of the trustee's rights.
>
> There are, however, several other sections of the act which define the trustee's rights, duties and powers. He takes not only all of the rights of the bankrupt in his property, having power to set aside certain transactions, but he also succeeds to all of the rights of creditors of the bankrupt, including the right to set aside conveyances which bind the bankrupt, and takes title to certain property with which the bankrupt has voluntarily parted and could not reclaim. It is said in 2 Remington on Bankruptcy, page 943, that 'it is doubtless true that the trustee's title since the amendment of 1910, is the most extensive and complete of any in jurisprudence."

This case (*Nusbaum* case) is to all intents and purposes identical with the case at bar. Neither the motor truck nor the proceeds of the sale thereof was in the possession of the bankrupt at the time of the filing of the petition. By a coincidence, the truck had been sold and the proceeds thereof paid to the City Bank ten days prior to the filing of the petition, just as in this case the automobiles had been repossessed ten days prior to bankruptcy. Both the truck and the money were gone when

the petition was filed, and neither came into the possession of the trustee in bankruptcy.

Had the motor truck been the property of Gatewood and Steinbaugh, Inc., the payment to the bank would, of course, have been a voidable preference of the most ordinary sort. Had the automobile truck been the property of some one else and Gatewood and Steinbaugh, Inc., had wrongfully sold it and paid over the proceeds to the Bank, the money would have belonged to the true owner of the truck who could have recovered it from the Bank. It would not have been a preference which the trustee in bankruptcy could avoid, because the money never belonged to the bankrupt and his trustee had no interest in it. On well settled principles, a voidable preference must be a payment of funds belonging to the bankrupt or a transfer of the bankrupt's property, and not that of a third person. But in the *Nusbaum* case, we have a *tertium quid*, namely, a transfer by the bankrupt of property which is not his own in point of fact, but which the law in Virginia considers his *quoad* his creditors, which, liberally construed, means "which the law considers his so far as his creditors are concerned". When faced with this situation, the Supreme Court of Appeals of Virginia adheres to its previous rulings, namely, that to all intents and purposes it is the same as though the property were the trader's. Having sold such property and used the proceeds to pay his debts, the proceeds could be recovered by his trustee in bankruptcy.

It will be noted that in the *Nusbaum* case, the controversy was not between the true owner of the goods (the consignor) and the trustee in bankruptcy, but between another creditor who had been preferred and the trustee in bankruptcy. However, the court held that the proceeds of the sale of the truck belonged to the trustee in bankruptcy, and they certainly could not belong to both the trustee and to the consignor. Now had the consignor sued the Bank for the proceeds of the sale of the

truck, could it have recovered? Certainly not, because the Virginia Court held that the trustee in bankruptcy was the one entitled to the proceeds of sale.

Now suppose that instead of selling the truck and paying over the proceeds to the Bank, Gatewood and Steinbaugh, Inc., had delivered the truck itself to the Bank to be applied on its debt at an agreed price; or suppose that the truck had been delivered to the consignor or repossessed by it; would the decision of the Court have been any different? Obviously not. The decision rests entirely on the fact that as far as creditors are concerned, the property was in contemplation of law the property of the trader, and the consignor has no more right to it than any other creditor. When such property is sold and the proceeds of sale applied on a debt, the estate of the bankrupt (and not that of a third person) is diminished, because the property is in contemplation of law the property of the bankrupt.

We respectfully submit, therefore, that the property of the trader need not come into the possession of the trustee in bankruptcy in order for the trustee in bankruptcy to exercise the rights given creditors under the "Traders' Act". For that matter the very essence of a preference is that it is some payment or transfer made prior to bankruptcy—these are the only sort which it is necessary to vacate and set aside. When the property comes into the possession of the trustee in bankruptcy, there is ordinarily no need to vacate a preference, because there has been none. In the *Nusbaum* case the possession of neither the truck nor the money came into the hands of the trustee; both were gone when the petition was filed. The court bases its decision entirely upon the preference provisions of the bankruptcy act, and of course the very purpose of the preference provisions is to allow the trustee to set aside transactions which have taken place prior to bankruptcy.

Could there be any possible doubt as to what would

have been the decision of the Virginia Court had the consignor himself repossessed the consigned goods, it is set at rest by the fact that in his opinion Judge Prentis, in reviewing the previous authorities, devotes half a page to a statement of the facts and decision in *Virginia Book Co.* v. *Sites*, 254 Fed. 46, decided by the Circuit Court of Appeals for the Fourth Circuit in 1918. We cannot state this case better than is done by Judge Prentis in his reference to it. He says:

> "In the recent case of *Virginia Book Co.* v. *Sites*, 254 Fed. 46, this appears: The bankrupt trader had been for a year or more the local agent of the Virginia Book Company, at Salem, Va., for the sale on commission of school books, consigned to him under an unrecorded contract by which the legal title of the books remained in the book company. Two days before the petition in bankruptcy was filed, and when the book company had reasonable cause to believe that the trader was insolvent, it canceled his agency and repossessed itself of such of the books as he then had. Upon petition of the trustee in bankruptcy, it was held that by virtue of the traders' act and its construction by the Virginia courts, the trustee could recover, and that the return of the books to the consignor under such circumstances was a voidable preference under the bankrupt act."

There is not one word of dissent from this case and a reading of the context convinces one that the Virginia Court approved of it as correctly interpreting the "Traders' Act".

Counsel for the petitioner is therefore asking this Honorable Court to reverse and overrule the Circuit Court of Appeals not only in the case at bar but also he is asking that its decision of ten years ago in the *Sites* case (*supra*) be overruled, a decision which, until now, had been unquestioned, as far as we know, and which has been adopted by the bar and by business as establishing

On November 10th the other two cars were also seized by the sheriff and turned over to Capitol Motor Corp., along with the other six. White, Trustee, then filed his petition and became a party to the detinue proceedings which were already pending.

The decision of the Supreme Court of Appeals was that White, trustee under the assignment, was entitled to the two automobiles which were in the possession of Lasker at the time of the assignment, but that the consignor was entitled to the six which had been repossessed prior to that time.

The only question raised in the case which was new was whether a trustee under an assignment for the benefit of creditors took title to goods on consignment if the provisions of the "Traders' Act" were not complied with. This situation had never arisen before. Hitherto the controversy had been between creditors who had levied on the consigned goods and the consignor thereof, or between the trustee in bankruptcy of the trader, and the consignor.

The briefs in the case show that it was earnestly contended that a trustee in an assignment for the benefit of creditors is not a creditor or a purchaser for value, but stands only in the shoes of the assignor, and as such could not claim title to property to which the trader himself could not claim title. There were many previous decisions in Virginia which counsel claimed so held. The court decided otherwise, however, namely, that the trustee under the assignment was the representative of the creditors.

The only other point decided in the case was one which was obviously true, namely, that the trustee under an assignment takes only what the assigning debtor has, and that an assigning debtor cannot assign that which has already been taken away from him. Therein lies one of the main differences between the conventional trustee under an assignment, and a trustee in bankruptcy—the

former cannot vacate preferences, the latter can. A man may have a hundred creditors and pay ninety-nine of them in full one day and make an assignment the next day of what is left for the remaining one, and he cannot object. His only recourse is to bankruptcy proceedings, whereupon the whole picture changes.

Judge Rose makes the distinction perfectly plain in his opinion in the instant case when he says:

> "These propositions are decisive of the case. The fact that in *Capitol Motor Corporation* v. *Lasker*, 138 Va. 630, it was properly held that a trustee under a conventional assignment or a deed of trust for the benefit of creditors has no rights as against property of which the vendor or lienor repossessed himself before the delivery of the deed of trust or assignment, is in no wise in conflict with the law as it has been above stated. A conventional trustee has no power to vacate preferences."

That *Capitol Motor Corp.* v. *Lasker* does not in any way overrule *Nusbaum, Trustee in Bankruptcy*, v. *City Bank and Trust Company* (*supra*) or *Virginia Book Co.* v. *Sites* (*supra*), is shown conclusively by the fact that both cases are referred to with obvious approval in the opinion and there is a quotation of half a page from the *Nusbaum* case. The *Capitol Motor Corporation* case was decided only six years after the *Nusbaum* case, and at the time it was decided, Judge Prentis, who wrote the opinion in the *Nusbaum* case was, and still is, the President of the Court.

BAILEY v. *BAKER ICE MACHINE CO.*

Counsel for the Petitioner relies strongly on *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268. That was a case which arose under the recording law of Kansas, which provided that a conditional sale is void against a creditor

of the vendee who fastens a lien upon the property before the contract is filed for record. The contract was so filed for record prior to the filing of the petition in bankruptcy, but within four months of bankruptcy. This Honorable Court held three things:

1—That the contract was a conditional sale contract and not an absolute sale with a mortgage back, basing its decision on the construction put on such cases by the Kansas Courts.

2—That the recording was not a preference.

3—That the rights given a trustee in bankruptcy by Section 47 a of the Bankruptcy Act relate to the time of the filing of the petition.

The first of these points obviously has no application to the instant case.

The third has no application because we are not relying on §47 of the Bankrupt Act, but on the familiar preference provisions contained therein. As already stated, the lower court, in the *Nusbaum* case, decided the case on the strength of §47 a of the Bankruptcy Act. Judge Prentis reversed him, pointing out that the preference provisions were applicable and controlled the case.

Coming now to discuss the second point decided, we submit that the ordinary recording statutes are in no way similar to the Virginia "Traders' Act". We have in Virginia, just as in most states, a recording act similar to the Kansas statute, being found in §5189 and in §5194 of the Virginia Code (1919). The "Traders' Act" is, however, found in an entirely different chapter of our Code, and differs radically from ordinary recording acts. In so holding that the recording was not a preference, this Honorable Court points out that a pref-

erence must be a transfer of the bankrupt's estate and his estate must be diminished, saying:

> "Applying this test to the contract in question, we think it did not operate as a preferential transfer by Grant Brothers, the bankrupts. The property to which it related was not theirs, but the Baker Company's."

But under the interpretation put on the "Traders' Act" by the Virginia Courts the property is the property of the trader, in contemplation of law and by a legal fiction. The Virginia Court says so in case after case, and in the *Nusbaum* case it expressly so holds and allows the trustee in bankruptcy to vacate the preference for that very reason. The *Nusbaum* case was incorrectly decided unless we consider the automobile truck the property of the trader by a legal fiction—on no other grounds whatever could the trustee in bankruptcy be entitled to recover.

What we have said above also applies to *Firestone Tire and Rubber Co.* v. *Cross, Trustee*, extensively quoted from by counsel for the petitioner in his brief. That is a case dealing with ordinary recording statutes. It was decided by the Circuit Court of Appeals for the Fourth Circuit and certainly no attempt is made in it to overrule its previous decision in *Virginia Book Co.* v. *Sites* (*supra*), in which case, it will be recalled, the consignor repossessed the books from the consignee prior to bankruptcy.

The remaining error assigned by counsel for the petitioner is that the decision of the Circuit Court of Appeals in the case at bar, creates a conflict of decision in the several circuits of the Circuit Courts of Appeals.

In answer to this we believe it is necessary to say only that the Virginia "Traders' Act" is a unique and unusual provision of law, found nowhere else than in

West Virginia and Mississippi. Virginia and West Virginia are both in the same circuit, and so far as we can find the Federal courts have never construed the Mississippi statute in such a way as to conflict with the decisions in the Circuit Court of Appeals for the Fourth Circuit. To the contrary, we most earnestly submit that the principles in the case at bar have been decided ten years ago by the Circuit Court of Appeals for the Fourth Circuit in *Virginia Book Co. v. Sites* (*supra*), the exact point here involved being there decided, and also by the Virginia Court of last resort six years ago in the *Nusbaum* case, and that a reversal of those principles by this Honorable Court at this late date would work a hardship in cases already settled and in business transactions which have doubtless followed therefrom, and would create the greatest confusion.

CONCLUSION.

In conclusion, therefore, we respectfully submit:

1—That Sections 60 and 67 of the Bankruptcy Act authorize the Trustee in Bankruptcy to set aside conveyances or transfers of the bankrupt's property made either by the bankrupt or by his creditors by legal proceedings, within four months of bankruptcy, when the other well known essentials of a preference are present.

2—That the transfer must be of the bankrupt's property and not that of another.

3—That the Virginia Court has held time and time again that under the "Traders' Act", the property is in contemplation of law the property of the bankrupt.

4—That in *Virginia Book Co.* v. *Sites* (*supra*), which is absolutely identical with the case at bar, the Circuit Court of Appeals for the Fourth Circuit held that the repossession of the consigned goods by the consignor was a voidable preference in bankruptcy, and this decision has been approved by the Virginia Court as correctly interpreting the "Traders' Act".

5—That the *Nusbaum* case is in all essential respects identical with the case at bar.

6—That this Honorable Court is bound by the construction put upon this Virginia statute by the Virginia Court of last resort, and that a reversal of the Circuit Court of Appeals in the case at bar would violate this principle.

7—That under the Virginia decisions, when the rights of other creditors became involved, the Finance and Guaranty Company had no more right to the four Velie automobiles than any other creditor, and when it repossessed them the situation was in no wise different than it would have been had it secured a judgment and levied on or attached any other property of W. A. Lee.

For these reasons we respectfully submit that the decision of the Circuit Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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Counsel for Respondent.